The Supreme Court and State Police Power, 1922-1930

By

THOMAS REED POWELL

Reprinted from the *Virginia Law Review*, Vols. XVII and XVIII

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The Supreme Court and State Police Power 1922-1930[1]

WHATEVER the theory, the fact is that the Supreme Court of the United States can pass on the reasonableness of the police measures of every state and city in the land. This is not to say that the judicial test of constitutional unreasonableness coincides with what the judges would not vote for if they were acting formally as legislators. They undoubtedly sustain legislation that they think silly or pernicious. Yet the point at which they call a halt as the limit of constitutional power is determined by them and not by the Constitution. Unreasonableness is too unreasonable when it becomes arbitrary or oppressive. Such are the terms. Like other terms they do not mark with precision their content. They can be known only by their fruits in the cases. The cases deal with situations so varied that their results can seldom be profitably expressed in generalizations. Discard the particulars, and the proposition for which a case may be thought to stand is one that affords little guide for judgment. We must go back to the particulars to find its meaning in the case.

Such is the notion on which proceeds this story of what the Supreme Court has done to the police legislation of the states that has come before it in the last eight years. Those who may resent the notion may still welcome the material and cast it into other patterns more to their philosophic taste. As a record of

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EDITOR'S NOTE—Certain departures from our usual copy form are at the request of the author.

AUTHOR'S NOTE—Certain departures from the author's usual copy form are the product of editorial prerogative.

[1] For reviews of police power cases from 1919 to 1922, see 19 MICH. L. REV. 136-147; 20 MICH. L. REV. 261-287; 21 MICH. L. REV. 307-333. These include the topic of public utilities which is not to be covered in the present series.

legislation, the recital marks what states are doing that some one thinks goes too far. Sometimes some or all of the judges think that a state has gone too far. During the period under consideration there have been changes on the bench which should be noted for those who wish to mark divisions of the Court. Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, and Butler were on the bench throughout the period. Mr. Chief Justice Taft was a member of the Court from the beginning until his resignation on February 3, 1930.[2] His successor, Mr. Chief Justice Hughes, was sworn in on February 24, 1930.[3] Mr. Justice Sanford was sworn in on February 19, 1923, and died March 8, 1930.[4] Neither his predecessor nor his successor participated in the work of the Court during these eight terms. Mr. Justice McKenna retired on January 15, 1925,[5] and Mr. Justice Stone succeeded him on March 2, 1925.[6]

In grouping the cases which follow, the idea has been to arrange them according to the things or relationships with which the legislation deals rather than according to any assumed purpose of the law-makers. The categories chosen are not in all respects mutually exclusive, so that some cases given in detail in one section are summarized briefly in another. The footnotes aim to contain a bibliography of all the police power material in the legal periodicals published during the eight years of the chronicle.[7] The only intentional omissions are of articles

[2] The last opinion announced by Mr. Chief Justice Taft was on November 25, 1929. Two opinions prepared by him were announced by Mr. Justice Van Devanter on January 6, 1930. The last opinion handed down by the Court prior to the resignation of Mr. Chief Justice Taft is reported in 280 U. S. 387.

[3] The first case decided by the Court on February 24, 1930, is reported in 280 U. S. 390. The first opinion announced by Mr. Chief Justice Hughes is reported in 281 U. S. 74. This is also the first case argued after February 24, 1930.

[4] The last case decided prior to this date is reported in 281 U. S. 66.

[5] This date marks the dividing line between 266 U. S. and 267 U. S.

[6] The first case decided on March 2, 1925, is reported in 267 U. S. 86. The first case argued after March 2, 1925, is reported in 267 U. S. 462. The first opinion written by Mr. Justice Stone was rendered on April 13, 1925, and is reported in 268 U. S. 111.

[7] For articles dealing with various phases of the police power as it is subjected to the due process test of the Fourteenth Amendment, see Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court,* 40 HARV.

which do not deign to cite cases, and of notes which attempt nothing more than a news statement of a case. Such notes are for the most part found only in commercial periodicals. Over sixty journals have been paged to extract their constitutional law material. In law reviews as well as in digests, constitutional law gets hidden under alien rubrics and the chronicler who seeks completeness must make his own index. The articles and notes here listed deal with issues under state constitutions as well as issues under the Federal Constitution. Most of the issues reported in the text would have been issues arising exclusively under state constitutions had it not been for the Civil War. For one interested in local self government the work of the Supreme Court of the United States in applying the Fourteenth Amendment to state legislation must raise the question whether judicial centralization is not pushed to an extreme under our federal system.[8]

L. REV. 943; Ormond F. Hunt, *Due Process of Law,* 10 BI-MON. L. REV. 187; Arthur P. Rose, *Due Process of Law,* 10 CONST. REV. 81; Margaret Spahr, *Natural Law, Due Process, and Economic Pressure,* 24 AM. POL. SCI. REV. 332; Hugh Evander Willis, *Due Process of Law under the United States Constitution,* 74 U. PA. L. REV. 331; Thomas B. Hill, Jr., *The Federal Constitution and the Fourteenth Amendment,* 1 ALA. L. REV. 68; Charles Grove Haines, *Judicial Review in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures,* 2 TEX. L. REV. 257, 387; George C. Lay, *State Legislation that Hurts,* 61 AM. L. REV. 39; William Draper Lewis, *Adaptation of the Law to Changing Conditions,* 11 AM. B. A. J. 11; Marvin B. Rosenberry, *Law and the Changing Order,* 9 MARQ. L. REV. 38; Nathanial Cantor, *Law and the Social Sciences,* 16 AM. B. A. J. 385; John R. Commons, *Law and Economics,* 34 YALE L. J. 371; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 POL. SCI. Q. 470; Charles Fairman, *Some Limitations on the Police Power of Municipalities Imposed by the Federal Constitution,* 19 ILL. L. REV. 401; Frank H. Somner, *The Fading Bill of Rights,* 4 N. Y. U. L. REV. 10; Maurice H. Merrill, *Unconstitutional Conditions,* 77 U. PA. L. REV. 879.

Problems of judicial behavior, more or less connected with judicial review, are treated in Harold J. Laski, *Judicial Review of Social Policy in England,* 39 HARV. L. REV. 832; Walter B. Kennedy, *Pragmatism as a Philosophy of Law,* 9 MARQ. L. REV. 63; Henry Rottschaefer, *Legal Theory and the Practice of Law,* 10 MINN. L. REV. 382; John Barker Waite, *Judicial Statesmen,* 8 AM. B. A. J. 375.

[8] For law review notes on general aspects of police power, see 29 COL. L. REV. 624, on dissimilarities in content between due process clauses of Fifth and Fourteenth Amendment; 30 COL. L. REV. 360, on consideration of facts in due process cases; 23 COL. L. REV. 774, on recent social legislation involving exercise of taxation and police power; 76 U. PA. L. REV. 446, on privi-

I. GOVERNMENTAL AND PROPRIETARY POWERS

The cases presented in this section involve the self-regulatory powers of government. More concretely they are concerned with legislative determination of the modes of political action, legislative stewardship over governmental powers, legislative tutelage of subordinate political agencies, and legislative management of public property or enterprises over which the power of the state is deemed to be that of a proprietor. Since no government liveth to itself alone, governmental management of affairs of state must touch also the affairs of individuals in their relation to the state. So we have individuals from time to time invoking the protection of the Federal Constitution against the exercises of self-determination indulged in by their states. Many more must be the issues raised under the constitutions of the states.[9] State constitution makers have been fond of dealing

leges and immunities clause; 10 ST. LOUIS L. REV. 135, on unconstitutional legislation in Missouri.

For consideration of the liberties protected by the Fourteenth Amendment, see John Robert Anthony, *Attitude of the Supreme Court Toward Liberty of Contract,* 6 TEX. L. REV. 266; Milton Colvin, *Liberty and the Police Power; or Rules for the Legal Life,* 13 AM. B. A. J. 11; Ray A. Brown, *Police Power—Legislation for Personal Health and Safety,* 42 HARV. L. REV. 866; Robert C. Brown, *Liberty,* 18 KY. L. J. 225; Clarence Manion, *Liberty and the Police Power,* 3 NOTRE DAME LAW. 240, *In re Liberty—(A Book and Its Critics),* 4 NOTRE DAME LAW. 350; Max Schoetz, Jr., *Natural and Inherent Rights Protected by the Fourteenth and Fifth Amendments of the United States Constitution,* 7 MARQ. L. REV. 154; F. Dumont Smith, *The Slaughter House Cases,* 10 AM. B. A. J. 120, *The Civil Rights Cases,* 10 AM. B. A. J. 192, *The Revolution,* 10 AM. B. A. J. 505; Charles Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431.

[9] For consideration of state constitution-making, see J. P. Chamberlain, *Constitutional Changes Since 1918,* 10 AM. B. A. J. 736; J. P. Chamberlain and Leo Brady, *Constitutional Changes in 1924,* 13 AM. B. A. J. 736; Henry P. Chandler, *Thoughts on Constitution Making,* 71 U. PA. L. REV. 218; C. B. Seymour, *The Nature and Effect of Changes in Constitutions,* 13 KY. L. J. 51; Charles A. Woods, *On Making Constitutions,* 11 AM. B. A. J. 47; George Stewart Brown, *The "New Bill of Rights" Amendment,* 9 VA. L. REV. 14; W. C. Palmer, *The Sources of the Oregon Constitution,* 5 OR. L. REV. 200; John C. Granberry, *The Contents of State Constitutions,* 4 S. W. Soc. & POL. Q. 187; Homer Hendricks, *Some Legal Aspects of Constitutional Conventions,* 2 TEX. L. REV. 195; W. W. Thornton, *Power of the Legislature to Call a Constitutional Convention,* 97 CENT. L. J. 368; John S. Strahorn, Jr., *Amending the Arkansas Constitution,* 10 S. W. Soc. & POL. Q. 103; James W. Noel, *In re: Proposed Constitutional Convention,* 5 IND.

in detail with the manner in which state government shall be conducted. In contrast with such fairly explicit restrictions, the restraints discovered by the Supreme Court in the Constitution of the United States are general in character and designed for the safeguarding of substantial individual interests rather than for instituting a plan for the operation of the state governmental machine.[10]

A. *Regulation of Governmental Interests*

1. Modes of Governmental Action

The conclusion that the Fourteenth Amendment does not for-

L. J. 373; Albert Stump, *Indiana Should Call a Constitutional Convention,* 5 IND. L. J. 354; Hugh E. Willis, *Revision of the Indiana Constitution,* 5 IND. L. J. 329; Theodore G. Gronert, *The Louisiana Constitutional Conventions of 1913 and 1921,* 4 S. W. SOC. & POL. Q. 301; Harvey Walker, *Need for Constitutional Revision in Ohio,* 4 U. CIN. L. REV. 339; William Anderson, *The Need for Constitutional Revision in Minnesota,* 11 MINN. L. REV. 189; and notes in 8 NEB. L. BUL. 180, on mode of amending the Nebraska constitution; 1 TEX. L. REV. 329, on power to call a constitutional convention without first submitting the issue to the electorate; 10 ST. LOUIS L. REV. 279, on alleged irregular adoption of constitutional amendment.

[10] Various questions of legislative power and procedure are discussed in William Anderson, *Special Legislation in Minnesota,* 7 MINN. L. REV. 133, 187; R. K. Gooch, *The Legal Nature of Legislative Rules of Procedure,* 12 VA. L. REV. 529; Frederick P. Lee, *The Office of Legislative Counsel,* 29 COL. L. REV. 381; Paul Mason, *Legislative Bill Drafting,* 14 CAL. L. REV. 298, 379; Oliver P. Field, *Presentation of Bills to the Governor,* 56 AM. L. REV. 898; Arnold J. Lien, *Convening the Special Session—Oklahoma's Predicament,* 17 NAT. MUN. REV. 139; M. T. Van Hecke, *Legislative Power at Special Sessions,* 9 CORN. L. Q. 447, *Impeachment of Governor at Special Session,* 3 WIS. L. REV. 155; and notes in 14 VA. L. REV. 576, on right of legislature to convene for impeachment purposes; 16 VA. L. REV. 845, on legislative budget in New York; 6 N. Y. U. L. REV. 463, on legislative investigation in New Jersey; 1 N. C. L. REV. 240, on formal limitations on legislative power in North Carolina; 43 HARV. L. REV. 482, on form of amendatory statute; 28 MICH. L. REV. 614, 7 N. C. L. REV. 65, on special legislation; 15 VA. L. REV. 607, on special legislation for cities; 34 YALE L. J. 676, on requirement of expressing a single subject in title of bill; 7 N. Y. U. L. REV. 182, on time when legislation may be approved by governor in Connecticut; 37 HARV. L. REV. 382, on effect of partial veto under Arizona constitution; 41 HARV. L. REV. 407, on effect of declaring veto of governor unconstitutional; 15 IOWA L. REV. 494, on delegating to joint committee power to punish for contempt; 4 TULANE L. REV. 316, on confirmation of appointment at special session; 43 HARV. L. REV. 623, on construction of statute adopted from another jurisdiction; 23 COL. L. REV. 674, on state legislation adopting federal standards. For other notes on similar topics, see *infra* note 13.

bid the states to intermingle the powers of government and delegate legislative power to courts and administrative authorities was said by Mr. Chief Justice Hughes in *Bryant* v. *Akron Metropolitan Park District* [11] to be so well established that it presents no substantial federal question.[12] The statute involved was one authorizing the judge of the probate court to act on petitions for the creation of park districts, to order the creation of such districts, and to appoint commissioners of parks with power to levy special assessments on property especially benefited and to levy taxes up to specified limits on all taxable property within the district. So far as appears from the opinion, the complainants did not allege an unconstitutional interference with protected private rights against this form of levying taxes. It is to be remembered that the failure of the Federal Constitution to forbid the states to intermingle the powers of government does not mean that it is indifferent whether restraints or penalties are imposed by one department of government rather than by another. Legislative or executive fiats cannot invariably be substituted for judicial proceedings; courts must often act like courts and not like potentates; and executives must sometimes be sufficiently guided by legislative canons so that they cannot rule by whim. This, however, is not because the powers of state government may not be confused but because the individual is entitled to the kind of governmental action to which he is entitled.[13]

[11] 281 U. S. 74, 50 Sup. Ct. 228 (1930), discussed in 18 CAL. L. REV. 439.

[12] For issues of separation of powers under state constitutions, see Murray A. Holcomb, *Mandamus to the Chief Executive of the State,* 3 S. W. SOC. & POL. Q. 25; Harold F. Kumm, *Mandamus to the Governor in Minnesota,* 9 MINN. L. REV. 21; W. G. Rice, Jr., *The Function of the Courts in Enforcing the Wisconsin Civil Service Law,* 2 WIS. L. REV. 257; and notes in 14 MINN. L. REV. 572, on mandamus against the governor of Minnesota; 15 VA. L. REV. 180, 192, on power of court to compel governor to make an appointment; 14 MINN. L. REV. 289, 8 NEB. L. BUL. 449, 39 YALE L. J. 413, on delegation to judiciary of power to create or supervise creation of municipal corporations; 8 BOST. L. REV. 203, 13 CAL. L. REV. 271, 15 ST. LOUIS L. REV. 96, 294, 13 VA. L. REV. 568, on whether admission to the bar is a legislative or judicial function; 36 HARV. L. REV. 106, on military government and trial by military court; 38 HARV. L. REV. 92, 120, on judicial interference with political parties; 8 OR. L. REV. 74, on injunction to prevent secretary of state from printing initiative measure on ballot.

[13] Other legislative problems are discussed in Ralph W. Aigler, *Legislation in Vague or General Terms,* 21 MICH. L. REV. 831; Joseph H. Beale,

The established canon that the guarantee of a republican form of government presents no issues for federal judicial action but can invoke only congressional enforcement was repeated in this same case of *Bryant* v. *Akron Metropolitan Park District* [14] to turn down a criticism of the provision of the Ohio constitution under which "no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void." In the case at bar the state supreme court had voted five to two that the statute was unconstitutional under the state constitution, but the failure to secure six judges required the affirmance of the judgment below. This Ohio provision did not affect the ultimate determination of all federal issues by the Supreme Court of the United States, and the Court held that rights of appeal are not essential to due process and that therefore the effect of the provision on issues of state constitutional law is not in conflict with guarantees of the Fourteenth Amendment.[15]

The power of the legislature to pass curative legislation to

The Jurisdiction of a Sovereign State, 36 HARV. L. REV. 241; J. P. Chamberlain, *Uniformity of Regulatory Laws Through Federal Models,* 9 AM. B. A. J. 383; James K. Pollock, *The Regulation of Lobbying,* 21 AM. POL. SCI. REV. 335; M. T. Van Hecke, *Legislative Power in North Carolina,* 1 N. C. L. REV. 172; William E. Britton, *Legislation of the [Illinois] Fifty-sixth General Assembly,* 24 ILL. L. REV. 547; John B. Sanborn, *Wisconsin Legislation of 1929,* 5 WIS. L. REV. 340; and notes in 24 COL. L. REV. 193, 20 ILL. L. REV. 841, 11 MARQ. L. REV. 108, on indefiniteness in statutory provisions; 10 ST. LOUIS L. REV. 135, on unconstitutional legislation in Missouri.

[14] *Supra* note 11. This feature of the case is discussed in Joseph H. Ingham, *Republican in Form,* 34 DICK. L. REV. 193. For other notes on the Ohio provision see 23 COL. L. REV. 291; 9 ST. LOUIS L. REV. 60; 33 YALE L. J. 60.

[15] On the initiative and referendum, see John H. Bass, *The Initiative and Referendum in Oklahoma,* 1 S. W. Soc. & POL. Q. 125; Wayne B. Wheeler, *Disguised Nullification in Referendum Elections to Repeal State Enforcement Codes,* 99 CENT. L. J. 349; and notes in 36 HARV. L. REV. 108, on the referendum provision of the Missouri constitution; 43 HARV. L. REV. 813, on the repeal of the referendum in Colorado; 13 CAL. L. REV. 151, on the initiative and referendum in California; 13 MASS. L. Q. [No. 4] 1, on the use of the initiative and referendum to express opinion on repeal of the Eighteenth Amendment; 42 HARV. L. REV. 580, on a case holding that the granting of a franchise is administrative in character and so not subject to the referendum; 4 WIS. L. REV. 117, on local option on statute condemning tubercular cattle.

validate a school district already held invalid by the highest court of the state was held in *Hodges* v. *Snyder* [16] to go so far as to warrant the state court on a second appeal in sustaining the school district as validly established. The contention of the protestants was that the first judgment of the court had vested them with rights that could not be taken away by subsequent legislation. The Supreme Court held that this principle applies only to private rights. A "public right," declared Mr. Justice Sanford, "even after it has been established by the judgment of a court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away." [17]

The decision in *Walton* v. *House of Representatives of Oklahoma* [18] that a federal district court has no jurisdiction to enjoin a state lower house from prosecuting articles of impeachment before the state senate was based by Mr. Justice Van Devanter on the ground that " a court of equity has no jurisdiction over the appointment and removal of public officers, * * * and particularly are the courts of the United States sitting as courts of equity without jurisdiction over the appointment and removal of state officers." [19] Attention was called, however, to an earlier decision of the Supreme Court [20] holding that the

[16] 261 U. S. 600, 43 Sup. Ct. 435 (1923).

[17] *Ibid.* 603, 43 Sup. Ct. at 436.

The executive budget in New York is considered in notes in 4 ST. JOHNS L. REV. 121, 16 VA. L. REV. 845, and in the following articles: Finla G. Crawford, *The Executive Budget Decision in New York,* 24 AM. POL. SCI. REV. 403; Rinehart J. Swenson, *New York Court Sustains the Executive Budget,* 19 NAT. MUN. REV. 81, *The New York State Budget Controversy,* 7 N. Y. U. L. REV. 174; William D. Guthrie, *The New York Executive Budget,* 16 AM. B. A. J. 83.

For discussion of other phases of state government see William Whatley Pierson, Jr., *Is There a Republican Form of Government?,* 2 N. C. L. REV. 14; Walter F. Dodd, *Reorganizing State Government,* 30 W. VA. L. Q. 262; William H. Edwards, *The State Reorganization Movement,* 1 DAK. L. REV. [No. 1] 13, [No. 2] 15, 2 *Id.* 17, 103; J. S. Young, *Reorganization of the Administrative Branch of the Minnesota Government,* 10 MINN. L. REV. 40.

[18] 265 U. S. 487, 44 Sup. Ct. 628 (1924).

[19] *Ibid.* 490, 44 Sup. Ct. at 628.

[20] Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890 (1900).

right to hold the state office of governor is not property that can claim protection under the due process clause of the Fourteenth Amendment.[21]

The question whether the action of a Democratic city committee in forbidding negroes to vote in a Democratic primary is an impairment of rights guaranteed by the Fourteenth and Fifteenth Amendments was said by Mr. Justice Holmes in *Love* v. *Griffith* [22] to present a "grave question of constitutional law"; but the question was left undecided for the reason that it was held that the state Supreme Court was within its powers in ruling that the cause of action terminated upon the conclusion of the election. The action was for an injunction and the rule complained of had been promulgated for a single election only.[23]

[21] Questions respecting officers, employees, and election disputes are dealt with in notes in 30 COL. L. REV. 888, on Corrupt Practices Act of Wisconsin; 39 YALE L. J. 578, on political affiliation as prerequisite for holding office; 37 HARV. L. REV. 384, on eligibility of insane person for office; 12 ST. LOUIS L. REV. 217, on requirement that judge be learned in the law; 23 ILL. L. REV. 398, 3 TEX. L. REV. 369, on eligibility of women to office after the Nineteenth Amendment; 8 MINN. L. REV. 62, 7 TEX. L. REV. 430, 78 U. PA. L. REV. 645, on injunction in election disputes; 42 HARV. L. REV. 956, 23 ILL. L. REV. 380, on meaning of "majority of votes cast"; 23 MICH. L. REV. 552, on effect of defective ballots; 24 COL. L. REV. 92, on effect of votes on illegal ballot; 14 VA. L. REV. 579, on effect of general fraud in election; 7 MINN. L. REV. 511, on effect of ineligibility of candidate receiving the highest vote; 34 YALE L. J. 797, on death of candidate receiving the highest vote; 10 MINN. L. REV. 256, 12 VA. L. REV. 658, on effect of promise by nominee to accept reduced salary if elected; 18 KY. L. J. 303, on right of candidate not party to election contest, but who received plurality of votes cast; 25 COL. L. REV. 923, 8 TEX. L. REV. 419, on giving preference to veterans.

[22] 266 U. S. 32, 45 Sup. Ct. 12 (1924). In 78 U. PA. L. REV. 666 is a note on a case dismissing as moot after an election a petition to have a name placed on the ballot. Mandamus to compel placing matter on ballot is discussed in 23 MICH. L. REV. 309.

[23] Questions of primaries, elections, and suffrage are considered in William Anderson, *The Constitutionality of Proportional Representation,* 12 NAT. MUN. REV. 743; E. L. Bennett, *Is P. R. Constitutional?,* 12 NAT. MUN. REV. 288; Howard Lee McBain, *Proportional Representation in American Cities,* 37 POL. SCI. Q. 281; Leon E. Aylsworth, *The Presidential Ballot,* 17 AM. POL. SCI. REV. 89; Ralph S. Boots, *The Presidential Primary,* 9 NAT. MUN. REV. 595; Robert A Maurer, *Congressional and State Control of Elections under the Constitution,* 16 GEORGETOWN L. J. 314; Paul M. Butler, *The Constitution and State Rights* [power of Senate to exclude members elected], 3 NOTRE DAME LAW. 17; Robert W. Lyman, *Compulsory Voting,* 32 DICK. L. REV. 261; William A. Robson, *Compulsory Voting,* 38 POL. SCI. Q. 569; Joseph P. Harris, *The Progress of Permanent Registration for Elections,*

The action in *Nixon* v. *Herndon*[24] was one for damages against the judges of election for excluding negroes from a Democratic primary by virtue of a statute which provided that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." After holding that the proceeding was not outside the jurisdiction of the federal courts because it concerned political action, Mr. Justice Holmes continued:

> "The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. * * * That Amendment 'not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the

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17 NAT. MUN. REV. 153; William C. Binkley, *State Efforts to Comply with the Nineteenth Amendment,* 1 S. W. SOC. & POL. Q. 266; G. A. McCleary, *The Constitutionality of Primary Legislation in Illinois,* 23 ILL. L. REV. 265; Various Authors, *The Direct Primory,* 106 ANN. AM. ACAD. POL. SCI. [No. 195]; Anon., *A Model Registration System,* 16 NAT. MUN. REV. 45; John G. Palfrey, *The Eligibility of Women for Public Office under the Constitution of Massachusetts,* 7 MASS. L. Q. 147.

[24] 273 U. S. 536, 47 Sup. Ct. 446 (1927), considered in James E. Pate, *The Texas White Primary Law,* 16 NAT. MUN. REV. 617, and notes in 33 LAW NOTES 101; 11 MARQ. L. REV. 259; 28 MICH. L. REV. 613; 6 NEB. L. BUL. 312; 12 ST. LOUIS L. REV. 199; 5 TEX. L. REV. 393. For notes on the case below or on similar cases, see 24 COL. L. REV. 923; 15 CORN. L. Q. 262; 43 HARV. L. REV. 467; 19 ILL. L. REV. 267; 23 MICH. L. REV. 279, 290; 13 MINN. L. REV. 375; 14 MINN. L. REV. 83; 4 NOTRE DAME LAW. 209; 3 TEMP. L. REV. 217; 11 VA. L. REV. 143; 16 VA. L. REV. 193; 39 YALE L. J. 423.

Other questions relating to voting are discussed in notes in 9 OR. L. REV. 497, on legislative control over qualifications of voters in Oregon; 73 U. PA. L REV. 176, 34 YALE L. J. 676, on absentee voters legislation; 72 U. PA. L REV. 175, on how far right to vote is absolute; 1 N. C. L. REV. 194, on political status of women; 28 MICH. L. REV. 820, on constitutionality of voting machines; 15 VA. L. REV. 796, on what is an official ballot; 5 TEX. L. REV. 217, on requiring oath that applicant for registration in primary has not voted for another party at the last election; 24 ILL. L. REV. 705, on forbidding deduction of wages for time spent in voting.

The effect of the Nineteenth Amendment on state control over jury duty is discussed in 13 CAL. L. REV. 155.

> laws. . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?' The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." [25]

A smack of governmental interest was injected by Mr. Justice Butler in *Terrace* v. *Thompson* [26] into the justification for forbidding aliens to own farm land when he said that "the quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself." [27] Earlier he had quoted with approval the following statement of the lower court:

> " 'It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.' " [28]

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[25] *Supra* note 24, at 540, 47 Sup. Ct. at 446.

For further discussion of elections and primaries, see notes in 14 KY. L. J. 250, 251, 252, 253, 358, 4 TEX. L. REV. 256, on elections; 1 TEX. L. REV. 232, on redistricting under the state constitution; 24 ILL. L. REV. 709, on duty of legislature to reapportion; 36 HARV. L. REV. 681, on the Hare system of voting in California; 22 MICH. L. REV. 482, on Hare system of proportional representation in Cleveland; 15 VA. L. REV. 390, on primary elections; 32 YALE L. J. 400, on curing defects in elections; 2 TEX. L. REV. 369, on mode of marking ballot.

[26] 263 U. S. 197, 44 Sup. Ct. 15 (1923). Other cases on the same and similar statutes are to be presented in the section on "Property Interests."

[27] *Ibid.* 221, 44 Sup. Ct. at 20.

[28] *Ibid.* 220, 44 Sup. Ct. at 20.

There is here a suggestion of the competence of the Japanese as California farmers which might lead to the inference that the legislation was not passed from motives purely political.

The notion that aliens would not make as satisfactory proprietors of pool-rooms as citizens may be expected to do was held in *Clarke* v. *Deckebach* [29] to have enough in it so that the legislation would not be pronounced clearly unreasonable and arbitrary. While aliens may claim protection under the due process and equal protection clauses, it seems evident that their historical disabilities influence the court in not scanning too closely the intrinsic merits of statutes excluding them from particular occupations.

2. Surrender of Governmental Powers

The canon that the state cannot surrender its power of eminent domain was reiterated by Mr. Justice Butler in *Georgia* v. *Chattanooga,*[30] though it was not necessary to the decision, since Georgia contended only that Tennessee had not given to Chattanooga the power to condemn the land owned by Georgia in that city. The court did not go into this question since it regarded it as one more appropriate to the Tennessee courts and found that Georgia could raise it by way of defence in the condemnation proceedings to which it was objecting. On the inability of a state to surrender its power of eminent domain, Mr. Justice Butler said:

> "The power of eminent domain is an attribute of sovereignty, and inheres in every independent State. * * * The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of a State. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will. * * * It is superior to property rights * * * and extends to all property within the jurisdiction of the State,—to lands already devoted to railway use, as well as to other lands within the State. * * *" [31]

[29] 274 U. S. 392, 47 Sup. Ct. 630 (1927).

[30] 264 U. S. 472, 44 Sup. Ct. 369 (1924). For discussion of another case on the same point, see 76 U. PA. L. REV. 457.

[31] *Ibid.* 480, 44 Sup. Ct. at 370.

An agreement by a city to pay the cost of extending a highway under the tracks of a railroad on land owned by it in fee was held in *Missouri, Kansas & Texas Ry.* v. *Oklahoma*[32] not to be a surrender of its police power or power of eminent domain, and the company's agreement to grant a right of way was said to be a valid consideration for the city's promise to pay the cost. Mr. Justice Butler seems to recognize that the city could not have bound itself not to open crossings but he holds that it could bind itself not to make the railroad pay the cost. This implies that compulsion to pay the cost is not a part of the police power, particularly when he says that "the city's agreement to bear the cost * * * does not infringe the police power."[33] Yet he says also that the police power includes the power to make the railroad bear the cost:

> "It is elementary that for the safety and convenience of the public, the State, either directly or through its municipalities, may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. * * * And such costs are not included in the just compensation which the railroad companies are entitled to receive. * * * If the enforcement of its provisions operates to hamper the State's power reasonably to regulate the construction and use of the Comanche Avenue crossing, then undoubtedly the ordinance is void."[34]

It was declared by Mr. Justice Butler in *Railroad Commission* v. *Los Angeles Railway Corporation*[35] that "it is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities."[36] It was declared fur-

[32] 271 U. S. 303, 46 Sup. Ct. 517 (1926).
[33] *Ibid.* 310, 46 Sup. Ct. at 519.
[34] *Ibid.* 307, 46 Sup. Ct. at 518.
[35] 280 U. S. 145, 50 Sup. Ct. 71 (1929).
[36] *Ibid.* 151, 50 Sup. Ct. at 72.

ther that the surrender of the governmental power of regulating rates is a grave act and therefore it must be clear that the state has done so. Apparently all the Court agreed that it was not clear that the state had given to the city the power to bind itself or the state not to exercise legislative power over rates. Mr. Justice Butler, for the majority, assumes by silence that this ends the matter. Both Mr. Justice Brandeis and Mr. Justice Stone in dissenting opinions take the position that as a matter of contract law the city without the power to bind itself not to regulate may still bind the carrier not to charge more than rates specified as one of the terms on which the franchise to operate is granted, as was the case here. Mr. Justice Brandeis says that this is a question of state law on which Supreme Court decisions are not controlling. For himself, at any rate, he declares that "the grant of the franchise is sufficient consideration, if so intended, for any number of contractual obligations which the Railway may have chosen to assume." [37] Mr. Justice Holmes joins in the dissent of Mr. Justice Brandeis.

Successful exercises of power to preclude by contract the exercise of the rate-making power for a term of years were found in two other cases. In *St. Cloud Public Service Co.* v. *St. Cloud*,[38] the state decisions had so clearly settled that the legisla-

[37] *Ibid.* 162, 50 Sup. Ct. at 76.

[38] 265 U. S. 352, 44 Sup. Ct. 492 (1924).

In Paducah v. Paducah Ry. Co., 261 U. S. 267, 42 Sup. Ct. 335 (1923) the court assumed that a city had statutory authority to contract, but held that the contract made was for a term of only one year and had expired.

In Georgia Railway & Power Co. v. Decatur, 262 U. S. 432, 43 Sup. Ct. 613 (1923) and Georgia Railway & Power Co. v. College Park, 262 U. S. 441, 43 Sup. Ct. 617 (1923) state decisions holding valid a contract between city and company with respect to fares were followed, but it was held that the contract did not apply to territory later annexed to the city, and that the attempt to apply the contract fares in that area impaired the obligation of the contract. This assumes that the contract implied a negative as to such territory. Since the contract fares were confiscatory, it seems more natural to hold that the attempt to apply them beyond contract territory denies due process of law.

Other litigation under the same contracts was decided in Georgia Power Co. v. Decatur, 281 U. S. 505, 50 Sup. Ct. 369 (1930), which held that the contract with a successor as to fares had not terminated by the expiration of the charter of the original recipient of the franchise. The city had no power over franchises, but only over use of the streets. The contract as to fares was made in connection with a grant of municipal permission to abandon

ture had conferred upon cities the power to contract that the rate contracts made were easily upheld without consideration of the question whether the rates were confiscatory. The fact that the cities were also given power to regulate rates was said by Mr. Justice Sanford not to cast doubt on the decisions sanctioning power to contract. "One power is not destructive of the other"; but the exercise of the power to contract suspends the power to regulate. The Court also examined the ordinance to ascertain whether it constituted a contract, and found that it did. Decisions of the state court as to the existence of the power still leave the inquiry whether it was in fact exercised. "The intention to so contract must clearly and unmistakably appear." [39]

The state decisions were found equally clear in *Opelika* v. *Opelika Sewer Co.*, [40] to the effect that the legislature had conferred upon a city power to make a contract which it could not revoke, although the legislature was precluded by the state constitution from itself granting irrevocable privileges. Thus the city and the utility were bound, though the legislature might destroy the contract rights of both. Mr. Justice Holmes found it also clear that the instrument in question purported to be a contract, and held, therefore, that the complainant could not adduce the due process clause against the low level of the rates.

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certain tracks and construct others. It contained a promise by the road to continue service, and the company was therefore enjoined from abandoning the tracks covered by the contract.

[39] St. Cloud Public Service Co. v. St. Cloud, *supra* note 38, at 361, 44 Sup. Ct. at 495.

[40] 265 U. S. 215, 44 Sup. Ct. 517 (1924).

This case was followed in Southern Utilities Co. v. Palatka, 268 U. S. 232, 45 Sup. Ct. 488 (1925) in which the state court was sustained in its ruling that the contract was binding although the rights of the city were subject to legislative abrogation. In considering the effect of "the unfettered power of the legislature to regulate the fares," Mr. Justice Holmes says, at page 233, 45 Sup. Ct. at 488:

> "* * * On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that in the absence of contract it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the Company in consideration of the grant of the franchise might not bind the Company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. * * * Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain. * * *"

The power of a city to part with title to land under tidal water so as to divest itself of the sovereign authority to preserve rights of navigation thereover was affirmed in *Appelby* v. *New York* [41] and *Appelby* v. *Delaney*.[42] While the existence of such a power depends upon state law, the Supreme Court must determine the law of the state for itself in a case arising under the obligation-of-contracts clause. Since the Supreme Court holds under some clauses of the Federal Constitution that states cannot divest themselves of certain public powers, the question whether any particular public power may be parted with must be regarded as one of federal constitutional law. The grants in question were made as part of a plan for improvement of the water front to afford facilities in aid of navigation. This distinguished it from the grant in a leading case [43] in which the Supreme Court held as a matter of state law that "the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." [44] Whether the Supreme Court would sanction a more complete relinquishment when the state court clearly affirmed the power is not involved in the case at bar. The state court here had held that the deed

[41] 271 U. S. 364, 46 Sup. Ct. 569 (1926).

[42] 271 U. S. 403, 46 Sup. Ct. 581 (1926).

[43] Illinois Central R. R. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110 (1892).

[44] *Ibid.* 453, 13 Sup. Ct. at 118, quoted in 271 U. S. 364, 394, 46 Sup. Ct. at 578.

Powers of the states with respect to land under water are treated in Frederick D. Colson, *Title to Beds of Lakes in New York*, 9 CORN. L. Q. 159, 288; Frank J. Downs, Jr., *Riparian Rights to Chicago's Lake Front*, 5 NOTRE DAME LAW. 140; George Sanford Parsons, *Public and Private Rights in the Foreshore*, 22 COL. L. REV. 707; W. Lewis Roberts, *Municipalities as Riparian Owners*, 12 KY. L. J. 10; Winthrop Taylor, *The Seashore and the People*, 10 CORN. L. Q. 303; Clifton Williams, *Who Owns the Bed of Lake Michigan?*, 12 MARQ. L. REV. 147; and notes in 11 MINN. L. REV. 574, 26 MICH. L. REV. 339, 5 WIS. L. REV. 34, on power to alien land under navigable water; 38 YALE L. J. 1146, on power of state to lease tidal lands; 18 ILL. L. REV. 571, on proprietary rights in Illinois lands underlying lakes; 22 MICH. L. REV. 848, on ownership of bed of inland lakes; 2 WIS. L. REV. 377, on use of shore of navigable lakes by public; 74 U. PA. L. REV. 316, on state jurisdiction over coastal waters.

In 14 VA. L. REV. 667 is a discussion of a ten-year grant of park space for a refreshment stand as an alienation of public lands for private use.

in question did not relinquish control of navigation so long as the land was not filled, but the Supreme Court held that the state court was in error about this matter of state law.[45] Navigation was subject to control by the paramount authority of the Secretary of War, but his action permitted the construction of docks on the parcel in question. The city had by statute forbidden the construction of a pier within 100 feet of another pier, and had built piers of its own at the ends of the streets bounding Appelby's parcel; these municipal piers did not have sufficient space between them to permit intervening piers within the limits set by the statute. The decree enjoined the city from dredging in the parcel owned by Appelby, from using the water as a slip or permanent mooring place for ships using the piers of the city, and from maintaining overhanging platforms which trespassed on the plaintiff's land. It did not forbid navigation or occasional mooring so long as the water remained navigable; but by rhetorical question Mr. Chief Justice Taft affirmed the right of the owner

[45] In the opinion of the New York Court of Appeals in the case of Appelby v. New York, 235 N. Y. 351, 362, 139 N. E. 474, 476 (1923), Judge Pound declared:

> "* * * Much that has been said in the cases as to the absolute and uncontrolled power of the state to grant the navigable waters for private purposes as it may grant the dry land it owns is dictum * * *, and in conflict with rules laid down in other well-considered cases which hold that the so-called jus privatum, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes. * * * The lands in question remain under the public waters of the state, and so long as they remain such, the right to control navigation over them remains in the state to be exercised in the public interest. * * * The jus privatum in any event is at all times subject to the jus publicum. * * * The right of the grantee to fill in his land under water with solid filling * * * is a delegated exercise of the public right in aid of commerce, and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But, such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation."

No additional clarity is conferred by the paragraph that follows:

> "The grant to plaintiffs, being a property right, which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey. The right of the public was not thereby extinguished. The city had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without reacquiring the title which it has authorized the city to convey to private owners."

to build piers as allowed by the Secretary of War notwithstanding the command of the city not to approach within 100 feet of another pier.[46]

The situation of a state which owns land in another state was declared by Mr. Justice Butler in *Georgia* v. *Chattanooga*[47] to be like that of a private owner. It can put up no claim of sovereignty against proceedings to condemn its land. Since the power to condemn "does not depend upon the consent or suability of the owner," Georgia must endure condemnation proceedings against its Tennessee land whether or not it has consented to be sued by Tennessee. The state in which another state has acquired land by its consent has the same power over that land as over any other within its borders.

3. Control over Subordinate Governmental Units

The complete power of the state, so far as the Federal Constitution is concerned, to provide for the government of its municipalities, and to interfere with their proprietary interests as

[46] Another issue as to grants of land under navigable water arose in Massachusetts v. New York, 271 U. S. 65, 46 Sup. Ct. 357 (1926), under the Treaty of Hartford concluded in 1786 between New York and Massachusetts under which land in New York was granted to Massachusetts, excepting "the Right and Title of Government Sovereignty and Jurisdiction." This was held to be a grant of the *jus privatum* only and not a grant of the *jus publicum*. Therefore Massachusetts did not acquire title to the land under water. In the opinion Mr. Justice Stone says, at page 89, 46 Sup. Ct. at 361:

> "It is a principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. * * * The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership. * * * Such grants are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction. * * *"

A further contention of Massachusetts was that it at least acquired title to the shore of the lake and did not part with it by its deed, and so can claim the land added to the shore by accretion. The court held, however, that its grant conveyed the strip between high and low water, since New York had always held that the rule as to lands bordering on tidal waters did not apply to lands bordering on non-tidal waters and that a conveyance to the shore carries to the water's edge at low water.

[47] *Supra* note 30.

well as with their political powers was affirmed in *Trenton* v. *New Jersey*,[48] in which Mr. Justice Butler declared:

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." [49]

The statute complained of imposed a tax of $1 per hundred million gallons of water diverted from public lakes or streams by corporations or municipalities in excess of 100 gallons daily per capita for each inhabitant of the municipality supplied, as shown by the census of 1905, with a proviso permitting continued free diversion of the amount being legally diverted on the effective date of the act. The City of Trenton had acquired its water system by purchase from a private company with the consent of the legislature long before the Act in litigation went into effect. It contended that its predecessor had acquired contract rights to continued free diversion and that the city in its proprietary capacity succeeded to those rights and was entitled to their protection against the state under the contract clause of the Federal Constitution. Its reliance on the distinction between governmental and proprietary functions formulated for the purpose of deciding issues respecting municipal liability for torts moved Mr. Justice Butler to say:

> "* * * But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view

[48] 262 U. S. 182, 43 Sup. Ct. 534 (1923), noted in 37 HARV. L. REV. 159, 18 ILL. L. REV. 477.

[49] *Ibid.* 187, 43 Sup. Ct. at 537.

of former opinions of this Court, no substantial federal question is presented." [50]

The same statute was applied to another city in *Newark* v. *New Jersey* [51] against the complaint that by taking the whimsical standard of what each city might chance to be diverting on the effective date of the Act the tax operated to deny the equal protection of the laws. Mr. Justice Butler answered that "the regulation of municipalities is a matter peculiarly within the domain of the State," and that "the City cannot invoke the protection of the Fourteenth Amendment against the State." [52]

So, also, in *Risty* v. *Chicago, Rock Island & Pacific Ry.*,[53]

[50] *Ibid.* 192, 43 Sup. Ct. at 538.

[51] 262 U. S. 192, 43 Sup. Ct. 539 (1923).

[52] *Ibid.* 196, 43 Sup. Ct. at 540.

Control by the legislature or by other state agencies over local governmental units is dealt with in Howard Lee McBain, *The Legal Status of the American Colonial City,* 40 POL. SCI. Q. 177; Charles M. Kneier, *The Legal Nature and Status of the American County,* 14 MINN. L. REV. 141; Conrad Wolf, *Indiana Municipalities and the State Government,* 4 IND. L. J. 231; John A. Fairlie, *Judicial and Administrative Control of County Officers,* 28 MICH. L. REV. 250; James E. Pate, *Central Administrative Control over Municipalities in the Southwest,* 8 S. W. SOC. & POL. Q. 225; and notes in 40 HARV. L. REV. 1153, on requiring cities to have two separate platoons in fire department; 21 MICH. L. REV. 701, on compelling county to furnish accommodations for a municipal court; 1 IND. L. J. 156, 27 MICH. L. REV. 567, on proceedings under statute to disannex territory from a city; 16 KY. L. J. 347, on power to distribute escheated property among political subdivisions; 15 IOWA L. REV. 96, on control of rights and liabilities of counties.

Legislative control over the borrowing capacities of cities is discussed in Charles B. Quarles, *Municipal Borrowing in Wisconsin,* 12 MARQ. L. REV. 18; and various notes on state-imposed debt limitation in 43 HARV. L. REV. 491; 71 U. PA. L. REV. 180; 38 YALE L. J. 120; 3 WIS. L. REV. 352; 17 KY. L. J. 304, on installment payments; 42 HARV. L. REV. 280, on refunding bonds; 39 YALE L. J. 1216, on profit producing enterprise. The application to emergencies of statutory limits on expenditures is discussed in 33 YALE L. J. 99.

Other questions relating to the exercise of borrowing power are dealt with in notes in 12 CAL. L. REV. 314, on percentage of votes required to issue bonds in California; 17 NAT. MUN. REV. 771, on necessity of complying with prescribed formalities in issuing bonds; 9 MINN. L. REV. 689, on form of submitting question to electorate as to issue of bonds; 8 N. C. L. REV. 471, on effect of thirty-day limitation on validity of bond ordinance; 6 TEX. L. REV. 234, on warrants as bonds within a referendum provision; 2 TEX. L. REV. 375, 34 YALE L. J. 100, on power to issue notes; 37 HARV. L. REV. 159, 72 U. PA. L. REV. 196, 15 VA. L. REV. 263, on effect of recitals in bonds.

[53] 270 U. S. 378, 390, 46 Sup. Ct. 237, 241 (1926). A similar case deny-

Mr. Justice Stone declared that "the power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment." Therefore the Court ordered the dismissal of the bill by a city against a state board which was in the same case being enjoined at the suit of private parties from levying certain assessments in connection with a drainage district. The proceedings started in the federal court. Federal questions were urged but the assessments were held unlawful under state law. It does not appear how the complaining city was affected by the statute. The defect discovered was the absence of statutory authority to assess cost of reconstruction on any lands not within the original drainage district. This defect would seem to go to the validity of an assessment on a city as well as to those on private owners. Jurisdiction of the city's complaint had to be predicated solely on the presence of a federal question, and the federal question was found to be unsubstantial because the city has no rights against a state so far as the Fourteenth Amendment is concerned.[54]

The General Court of Massachusetts granted to the city of

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ing the right of a city to enjoin the collection of a state tax is noted in 42 HARV. L. REV. 134.

[54] The powers of cities are discussed in William Anderson, *The Extraterritorial Powers of Cities,* 61 AM. L. REV. 641; Thomas H. Breeze, *Limitations on the Right of a Municipality in California to Condemn a Public Utility,* 16 CAL. L. REV. 105; Lloyd E. Graybill, *Review of Recent California Decisions on Municipal Law,* 11 CAL. L. REV. 73; and notes in 41 HARV. L. REV. 894, on extraterritorial powers of cities; 7 N. Y. U. L. REV. 743, on power to take property by eminent domain; 18 ILL. L. REV. 207, 567, on reasonableness of municipal ordinances; 3 TEMP. L. REV. 75, on refusal of court to declare ordinance void merely because deemed unwise; 16 CAL. L. REV. 336, on conflict between ordinance and statute regulating traffic; 17 KY. L. J. 171, on municipal zoning without express authority; 11 MINN. L. REV. 381, on moving picture censorship without express delegation; 22 MICH. L. REV. 174, on necessity of express authority to forbid through busses from stopping.

Other issues relating to cities are presented in Oliver P. Field, *The Status of a Municipal Corporation under an Unconstitutional Statute,* 27 MICH. L. REV. 523; Charles W. Tooke, *De Facto Municipal Corporations under Unconstitutional Statutes,* 37 YALE L. J. 835, *Discretion of Courts in Actions to Dissolve Municipal Corporations,* 6 N. Y. U. L. REV. 112; and notes in 42 HARV. L. REV. 281, on collateral attack upon annexation of additional territory; 5 NOTRE DAME LAW. 280, on *de facto* municipal corporations; 3 TEMP. L. REV. 22, on a case holding that an ouster judgment against a *de facto* municipal corporation is not retroactive.

Boston the right to construct a subway and to hold it "in its private or proprietary capacity, for its own property." Boston leased the subway to a private company which fell into financial difficulties. The Commonwealth thereupon with the full and unmistakable consent of the corporation and its stockholders provided for public operation of the road by public trustees under the lease from the city, with apparently adequate provisions for payment of dividends. Deficits incurred by the public trustees in running the road were to be paid by the Commonwealth from funds raised by taxation on the communities served by the road. The first year showed a deficit of $4,000,000. The trustees had charged $2,000,000 for depreciation and $2,300,000 for maintenance and repair, though in previous years the company itself had spent not more than $100,000 a year. Boston thought she was in some way being unconstitutionally injured, but Mr. Chief Justice Taft in *Boston* v. *Jackson* [55] assured her that she was being helped by a statute which secured to her the performance of the obligations of her lessee. She was not losing her beneficial interest in the lease because she got her money, and the taxes which enabled her to do so came not from her but from her citizens through a levy by the state. This was the theory of the state court with which the Supreme Court found no fault. Upon that theory the Chief Justice said that "we can not see that in any respect the levy of the tax for deficits impairs Boston's contract with the railway company." [56] The state court had proceeded on the theory that the city in its proprietary capacity may acquire rights which the contract clause will protect as against the state. The Supreme Court proceeded upon the same assumption, but, said the Chief Justice, "we do not wish to be understood as accepting such assumption as an established rule." [57]

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[55] 260 U. S. 309, 43 Sup. Ct. 129 (1922), noted in 71 U. PA. L. REV. 265. The decision in the state court is discussed in 36 HARV. L. REV. 465, 486.

[56] *Ibid.* 315, 43 Sup. Ct. at 132.

[57] *Ibid.* 316, 43 Sup. Ct. at 132.

On problems of municipal home rule under provisions of state constitutions, see the following articles: William Anderson, *Municipal Home Rule in Minnesota,* 7 MINN. L. REV. 306; James D. Barnett, *A County Home Rule Constitutional Amendment,* 8 OR. L. REV. 343; F. F. Blachly, *Municipal Home Rule in Oklahoma,* 1 S. W. Soc. & POL. Q. 17; E. R. Cockrell, *Municipal Home Rule with Special Reference to the State of Texas,* 1 S.

A Rhode Island statute authorizing the city of Providence to take land by eminent domain for the construction of a water system required it to furnish water at wholesale rates to other communities in the watershed and did not impose on the other governmental units any part of the cost of construction. A property owner who objected to the enterprise for other reasons assumed the rôle of taxpayer to object on behalf of the city of Providence and its taxpayers. In denying him comfort in *Joslin Manufacturing Co.* v. *Providence,*[58] Mr. Justice Sutherland said:

> "That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed; but that is not the case here presented. The communities to be supplied are those within the drainage area of the waters authorized to be taken. These waters are under the primary control of the State and in allowing the City of Providence

W. Soc. & Pol. Q. 147; Albert R. Ellingwood, *The Constitutional Aspects of Municipal Home Rule in Illinois,* 23 Ill. L. Rev. 339; W. H. Fallon, *Home Rule in Michigan Cities,* 7 Bi-Mon. L. Rev. 105; Vincent J. Keane, *The New York Home Rule Amendment in the Courts,* 2 St. Johns L. Rev. 35, *The Multiple Dwelling Law Decision,* 4 St. Johns L. Rev. 45; Howard Lee McBain, *New York's Proposal for Municipal Home Rule,* 37 Pol. Sci. Q. 655; J. S. McGoldrick, *Home Rule in New York State,* 19 Am. Pol. Sci. Rev. 693; Alfred S. Reinhart, *Municipal Home Rule in Colorado,* 28 Mich. L. Rev. 382; Max Shoetz, Jr., *Home Rule and the Inherent Powers of a Municipal Corporation,* 7 Marq. L. Rev. 192.

On municipal home rule in New York, largely with reference to power to regulate dwellings and rents, see notes in 30 Col. L. Rev. 264; 24 Ill. L. Rev. 596; 7 N. Y. U. L. Rev. 752; 4 St. Johns L. Rev. 123; 16 Va. L. Rev. 189; 39 Yale L. J. 92.

Whether a municipal market is a "public purpose" under the California home rule provision is discussed in 11 Cal. L. Rev. 446 and 22 Mich. L. Rev. 276.

Powers of home rule cities to legislate independently are considered in 6 Tex. L. Rev. 497, on prohibiting use of streets by carriers of passengers for hire; 22 Ill. L. Rev. 676, on requiring bonds from taxi-cab drivers; 20 Ill. L. Rev. 704, on creating courts; 28 Mich. L. Rev. 620, on prescribing voting machines for state elections.

In 8 Minn. L. Rev. 70 is a note on the power of the governor of Minnesota to remove a municipal officer when a home rule charter provides for recall; in 9 Minn. L. Rev. 290, a discussion of an amendment of a home rule charter in Michigan to make provision for pensions; and in 3 Wis. L. Rev. 423, a consideration of home rule in Wisconsin.

Municipal immunity from general state statutes regulating height of buildings is discussed in 15 Cal. L. Rev. 75; 40 Harv. L. Rev. 504; 36 Yale L. J. 277.

[58] 262 U. S. 668, 43 Sup. Ct. 684 (1923).

> to appropriate them, it was entirely just and proper for the legislature to safeguard the necessities of other communities who might be dependent thereon, and to that end to impose upon the City of Providence such reasonable conditions as might be necessary and appropriate. Municipalities are political subdivisions of the State and are subject to the will of the legislature, * * * and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well. * * * The requirement here in question is one well within the rule. * * *" [59]

So it was held proper to make Providence furnish water to its neighbors without requiring the neighbors to share in the enterprise except as customers. "The legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another." [60] It was held proper also for the legislature to vest in the city the power to determine the necessity of the taking. "The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." [61]

That municipal contracts limiting the rates of a carrier may be abrogated by the state so far as the city is concerned was assumed in *Railroad Commission* v. *Los Angeles Railway Corporation* [62] in an opinion in which Mr. Justice Butler held that the city had no contract rights and that they had been abrogated. Mr. Justice McReynolds thought that the decision on the first point made it inappropriate to consider the second. The abrogation apparent to five members of the Court was discovered in the action of the state commission permitting an increase which the road rejected, with the consequent dismissal of the petition upon the request of the road, and further action of the commission denying a requested increase on the ground that the facts did not warrant it. We have to get the reason why abrogation comes

[59] *Ibid.* 673, 43 Sup. Ct. at 687.
[60] *Ibid.* 674, 43 Sup. Ct. at 687.
[61] *Ibid.* 678, 43 Sup. Ct. at 689.
[62] 280 U. S. 145, 50 Sup. Ct. 71 (1929), commented on in Richard J. Smith, *The Judicial Interpretation of Public Utility Franchises*, 39 YALE L. J. 956; and notes in 10 BOST. L. REV. 252; 18 CAL. L. REV. 427; 30 COL. L. REV. 527; 28 MICH. L. REV. 774; 19 NAT. MUN. REV. 51, 110; 7 N. Y. U. L. REV. 764; 39 YALE L. J. 956.

from failure to abrogate by reading the statement—"the proceedings before the commission and its orders clearly show that it twice took jurisdiction to determine just and reasonable rates" [63] —in the light of a quotation from an earlier case to be reviewed in the next paragraph. In dissenting on this point, Mr. Justice Brandeis said:

> "Assuming that the Railway was bound by contract to maintain a five-cent fare, it could be relieved from its obligation only by the Commission. Had the Commission authorized an increase in fare, it would still be questionable whether the contract would have been thereby abrogated or only modified by making the Railway's obligation less onerous. Surely, the Commission's refusal to grant any help, because in its opinion none is needed, cannot have the anomalous effect of entirely relieving the Railway of its obligation." [64]

And Mr. Justice Stone reinforced this position by saying:

> "* * * Even if necessary to decide the question, I would not be prepared to say that the refusal of the commission to fix a fare different from the contract rate would destroy the contract. By contracting for a five-cent fare, the railway company waived the protection of the due process clause of the Fourteenth Amendment. * * * Granting that the contract was subject to the power and duty of the commission to modify it by changing the rate, that power has not been exercised and the duty is one arising, not under the Constitution and laws of the United States, but is imposed by state statute, for breach of which a state remedy alone should be given." [65]

The passage from which Mr. Justice Butler quoted in the *Los*

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[63] *Ibid.* 158, 50 Sup. Ct. at 74.

[64] *Ibid.* 162, 50 Sup. Ct. at 76.

Because the question whether contracts had been abrogated depended upon complicated questions of state law, the Supreme Court denied an injunction against them in Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 49 Sup. Ct. 282 (1929), noted in 30 COL. L. REV. 527, 4 NOTRE DAME LAW. 564, 4 ST. JOHNS L. REV. 76. For discussions prior to the Supreme Court decision, see John Bauer, *The New York Rapid Transit Contracts Before the Supreme Court,* 7 N. Y. U. L. REV. 120; and notes in 28 COL. L. REV. 812; 17 NAT. MUN. REV. 348, 703; 18 NAT. MUN. REV. 47.

A refusal of the district court to allow the City of New York to become a party defendant in a proceeding to enjoin telephone rates was affirmed in New York v. New York Telephone Co., 261 U. S. 312, 43 Sup. Ct. 372 (1923).

[65] *Supra* note 62 at 162, 50 Sup. Ct. at 78.

Angeles case was the following in the opinion of Mr. Justice McReynolds in *Denney* v. *Pacific Telephone & Telegraph Co.*: [66]

> "The Department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute. * * *" [67]

The statute referred to was one of the state of Washington giving to a commission power to direct the termination of contracts fixing rates, and ordering it, whenever it shall find rates to be unjust, to determine the just and reasonable rates and fix them by order. The commission had considered the existing rates (which were higher than the franchise rates) and declared them fair and denied an increase. An injunction against their continuance was then obtained in the federal district court. This was affirmed by the Supreme Court on the ground that the state statutes as interpreted by the state court made the commission proceedings effective as an abrogation of the contract rates. The support for this view of the state law was found in an opinion of the state court in a case in which a city objected to commission action increasing contract rates without first declaring the contract terminated. Of the order raising the rates, the state court said:

> "'* * * the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words "and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated," or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material.'" [68]

All that this affirms is the power of the commission to raise rates without saying in so many words that the contract rate is hereby terminated. Mr. Justice McReynolds apparently tries to make it mean more when he says:

"In the same cause the Gas Company maintained that the rates

[66] 276 U. S. 97, 48 Sup. Ct. 223 (1928).
[67] *Ibid.* 102, 48 Sup. Ct. at 224.
[68] *Ibid.* 103, 48 Sup. Ct. at 225.

> prescribed by the Commission's order were inadequate for its needs and unjust. This matter was carefully considered upon the merits, but the opinion nowhere suggests that the rates prescribed should be treated as if specified in the franchise and obligatory upon the Company whether compensatory or no." [69]

This, however, does not show that the state court thought the question before it one of due process rather than one of interpreting the statutory command to fix rates that are reasonable and just. Mr. Justice McReynolds does not point to anything in the opinions of the state court that clearly establishes a view that commission consideration in and of itself abrogates the rate contract for all time. There may have been something of the kind, for no one dissented. Mr. Justice Stone did not sit. Whatever the Washington law may be, it does not in and of itself justify the assumption that the California law under a different statute is the same, as Mr. Justice Butler seems to assume in the *Los Angeles* case.[70]

The treatment of these cases leaves one to infer that sometimes it is not the state but the Supreme Court that has exercised a power to abrogate the contract rights of municipalities. This

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[69] *Ibid.*

[70] In Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 46 Sup. Ct. 112 (1925) a company which had been granted by the commission an increase over its franchise rates, with permission to petition again after six months for a further increase, disregarded the commission and sought in the federal district court an injunction against the continuance of the rates fixed by the commission six months earlier. In the interim the power of the commission to increase the franchise rates had been sanctioned by the state court. Without passing on the question whether the company had become entitled to compensatory rates, the Supreme Court held that the district court was right in refusing the injunction on the ground that the company had failed to exhaust its administrative remedies. Yet Mr. Chief Justice Taft seems clearly unaware of any notion that mere consideration by the commission can end the city's rights under the franchise contract, when he says at page 282, 46 Sup. Ct. at 113:

> "* * * Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. * * * It was, therefore, plainly within the power and discretion of the Commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go. No constitutional rights of the Water Company to be protected against confiscation would be infringed by such reasonable delay."

is facilitated by the practice of starting injunction proceedings in the federal district court instead of first getting the highest state court to interpret the legislation respecting rates fixed by contract. The imposition of a duty on a state commission to fix rates that are fair is not of necessity indicative of an intention to subject the commission action or inaction to the supervisory scrutiny of the Supreme Court of the United States in the light or shadow of its amorphous "fair return on fair value" formula. After what has now happened, state legislatures desiring to afford relief to distressed carriers, but to retain in state agencies control of the degree of grace to be granted, should take pains to specify that the contract still binds the carrier except to the extent that increases are approved by state commissions and state courts. In matters so peculiarly local as legislation affecting contract rights of cities, it seems strikingly inappropriate for the Supreme Court to anticipate the state courts in the interpretation of state statutes. The canon that was applied in the *Interborough* case [71] is equally worthy of acceptation in these other cases.

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[71] Gilchrist v. Interborough Rapid Transit Co., *supra* note 64.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—II [1]

I. GOVERNMENTAL AND PROPRIETARY POWERS (*concluded*)

WHILE the distinction between governmental powers and proprietary powers is not wholly clean cut, it roughly corresponds to the difference between politics, in the Aristotelian sense, and business. Control over cities, determination of the methods of political action, and the maintenance or surrender of governmental prerogatives fall within the class of governmental powers. These have been covered in the first instalment of this review. There remains the survey of proprietary powers, such as the control over public contracts, the construction and management of publicly-owned or publicly-run transportation systems, the conduct of public schools and hospitals, the control over public highways, and the management of natural resources and wild life with respect to which the state seems to be thought of as owner or proprietor, though doubtless all that is meant by this is that the state possesses more complete power of controlling such natural resources than it enjoys in respect to property and business generally.

B. *Regulation of Proprietary Interests*

The principle that the state may prescribe the wages to be paid to laborers employed by contractors on work for the state came in conflict in *Connally* v. *General Construction Co.*,[2] with the principle that criminal statutes must be definite, and the latter principle won. The requirement to pay "not less than the current rate of per diem wages in the locality where the work is performed" was held to be doubly indefinite. The current rate varies with

[1] For the first instalment, see 17 VA. L. REV. 529.

[2] 269 U. S. 385, 46 Sup. Ct. 126 (1926), noted in 39 HARV. L. REV. 871, 895; 21 ILL. L. REV. 43; 24 MICH. L. REV. 864; and 35 YALE L. J. 630. On the same problem see Noel Sargent, *Public Contracts and Union Labor*, 97 CENT. L. J. 295; and notes in 28 COL. L. REV. 239; 26 MICH. L. REV. 337; and 6 N. C. L. REV. 88. The legal aspects of convict labor are considered in 25 COL. L. REV. 814.

different employers and different employees, and no one can say with accuracy what are the limits of the "locality" in which the work is being done. Justice Holmes and Brandeis concurred in the result for the reason that "the plaintiff was not violating the statute by any criterion available in the vicinity" of the place where it was building a bridge. [3]

The power of a state to take over the lease of a subway from a financially embarassed lessee operating corporation was affirmed in *Boston* v. *Jackson* [4] in which Mr. Chief Justice Taft declared:

> "* * * If the constitution and laws of Massachusetts authorize the Commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent. Nor is there anything in it preventing the State from using the trustees as agents to operate the railway and in such operation to determine the needed expenditures to comply with the obligations of the lease or the requirements of adequate public service. This is delegating to proper agents the decision of a proper administrative policy in the management of a state enterprise and the ascertainment of facts peculiarly within their field of authorized action." [5]

So also in *Milheim* v. *Moffat Tunnel Improvement District* [6] it was held that the state may construct and own a tunnel and assess the cost on a special district served by its use, even though the purpose is to lease the tunnel to a railroad, since the use by the railroad will be for a beneficial public purpose. "The test of the public character of an improvement," said Mr. Justice Sanford, "is the use to which it is to be put, not the person by whom

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[3] On other problems of public contracts see O. R. McGuire, *Public Contracts and Publicity,* 18 GEORGETOWN L. J. 179; and notes in 2 TEX. L. REV. 128, on right of city to contract with public service company in Texas; in 5 TEX. L. REV. 105, on necessity for competitive bidding; and in 39 YALE L. J. 430, on power of school district to insure in a mutual company. On municipal liability on bonds see 25 COL. L. REV. 377; 13 IOWA L. REV. 81, 111, 359; 17 NAT. MUN. REV. 236, 237. On municipal liability on implied contract or in quasi-contract see 38 HARV. L. REV. 120; 26 MICH. L. REV. 335; 9 MINN. L. REV. 579; 4 NOTRE DAME LAW. 569; 5 NEB. L. BUL. 348; 8 N. C. L. REV. 211; and 7 TEX. L. REV. 172.

[4] 260 U. S. 309, 43 Sup. Ct. 129 (1922). See 17 VA. L. REV. 529, at 550 [*supra,* page 22] for a statement of another point of the case.

[5] *Ibid.* 316, 43 Sup. Ct. at 132.

[6] 262 U. S. 710, 43 Sup. Ct. 694 (1923).

it is to be operated." The recognized power of the state to impose or authorize a tax to aid in the construction of a privately-owned railroad was adduced in support of this lesser form of aid.[7]

Ever since the Supreme Court sustained by unanimous decision the power of North Dakota to engage in the enterprises of banking, warehousing, and home-building,[8] it has seemed likely that it would be tolerant toward the entrance of states and cities into many activities formerly deemed to be of a somewhat private nature. This inference is reinforced by the observation of Mr. Chief Justice Taft in *Wolff Packing Co.* v. *Court of Industrial Relations* [9] in which, by way of distinguishing the term "property devoted to a public use" as a test for extensive regulation from the term "public purpose" as a test of taxing power, he says that "in the latter, the use for which the tax is laid may be any purpose in which the State may engage, and this covers almost any private business if the legislature thinks the State's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation." [10]

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[7] For articles on the propriety of various public expenditures see George Gordon Battle, *The Powers of a Municipality to Spend Its Funds for the Entertainment of Distinguished Visitors, for Public Celebrations, for the Erection of Monuments, and for Other Like Purposes,* 10 VA. L. REV. 417; J. Cullen Brown, *The Municipality: Its Power to Engage in Private Business,* 2 NOTRE DAME LAW. 145; Gullie B. Golden, *Purposes for Which Parks May Be Used,* 9 AM. B. A. J. 325; Dexter Merriam Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine,* 25 MICH. L. REV. 596; Charles M. Kneier, *Municipal Functions and the Law of Public Purpose,* 76 U. PA. L. REV. 824; Breck P. McAllister, *Public Purpose in Taxation,* 18 CAL. L. REV. 137, 241; and W. A. Shumaker, *Power of a Municipality to Sell Fuel,* 29 LAW NOTES 225.

[8] In Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920), discussed in 8 CAL. L. REV. 425; 34 HARV. L. REV. 207, 212; 7 VA. L. REV. 306; and 30 YALE L. J. 429. The case in the court below is considered in 4 MINN. L. REV. 65 and 29 YALE L. J. 933. For articles on the North Dakota problem, see Andrew A. Bruce, *The Tyranny of the Taxing Power,* 18 MICH. L. REV. 508, and *State Socialism and the School Land Grants,* 33 HARV. L. REV. 401

[9] 262 U. S. 522, 43 Sup. Ct. 630 (1923).

[10] *Ibid.* 537, 43 Sup. Ct. at 633.

For law review notes on the undertaking of various municipal functions see discussions of establishment of municipal airports in 1 AIR L. REV. 139; 14 IOWA L. REV. 233; 26 MICH. L. REV. 940; 12 MINN. L. REV. 549; 17 NAT. MUN. REV. 604; 18 NAT. MUN. REV. 263; 14 ST. LOUIS L. REV. 441; 8 TENN. L. REV. 64; 76 U. PA. L. REV. 1004; and 15 VA. L. REV. 491; of power to sublet airport in 18 NAT. MUN. REV. 411 and 4 NOTRE DAME LAW. 483; of a

The use of state funds to furnish text books to school children free of cost was sustained in *Cochran* v. *Louisiana State Board of Education*[11] as taxation for a public and not a private purpose. The contention that the statute was in aid of private, religious, and sectarian schools was answered by Mr. Chief Justice Hughes by quoting from the opinion of the state court to the effect that the aid was extended to school children and not to the schools which they attended. To this he added:

> "* * * The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."[12]

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municipal radio station in 3 So. CAL. L. REV. 353; of municipal sale of gasoline in 26 COL. L. REV. 762; 21 ILL. L. REV. 178; 10 MINN. L. REV. 251, 442; 1 So. CAL. L. REV. 390; and 12 VA. L. REV. 498; of a retail fuel business in 7 MINN. L. REV. 63; of a municipal market in 11 CAL. L. REV. 446; of electric power, light, and ice in 16 NAT. MUN. REV. 491; of furnishing surplus water beyond city limits in 15 VA. L. REV. 408; of a municipal golf course in 73 U. PA. L. REV. 213; of a swimming pool in park in 15 VA. L. REV. 75; of excursions into business enterprise in 22 COL. L. REV. 737 and 41 HARV. L. REV. 775; of use of memorial building to exhibit shows for profit in 18 NAT. MUN. REV. 183; of investment of industrial accident fund in office building in 7 OR. L. REV. 344; and of conduct of city celebration in 33 YALE L. J. 328.

[11] 281 U. S. 370, 50 Sup. Ct. 335 (1930). For a discussion of free school books see 33 LAW NOTES 121.

[12] *Ibid.* 375, 50 Sup. Ct. at 336.

Various public expenditures are discussed in Burke Shartel, *Pensions for Judges,* 27 MICH. L. REV. 134; Paul Studensky, *Pensions in Public Employment,* 11 NAT. MUN. REV. 97; Charles Kettleborough, *Soldiers' Bonus,* 16 AM. POL. SCI. REV. 455; Ira Jewel Williams, *Old Age Pensions,* 11 CONST. REV. 239; and notes in 19 ILL. L. REV. 485, on pension for police and militia; in 5 ALA. L. REV. 296, on compensation to injured member of state militia; in 10 CAL. L. REV. 415, on aid to veterans otherwise than by bonus; in 38 HARV. L. REV. 519, on aid to farmers' co-operative associations; in 73 U. PA. L. REV. 316, on Pennsylvania Old Age Assistance Law; in 10 ST. LOUIS L. REV. 202, on increase of compensation to contractors; in 25 COL. L. REV. 241, 42 HARV. L. REV. 127, and 38 YALE L. J. 388, on counsel fees and disbursements of officer unlawfully removed; in 23 MICH. L. REV. 666 and 34 YALE L. J. 446, on reimbursement of officer for expense in defending criminal prosecution; in 13 NAT. MUN. REV. 739, on expenditure of funds to persuade voters to vote for bond issue; in 38 HARV. L. REV. 402, on payment to lobbyist for services; in 2 N. C. L. REV. 38 and 4 N. C. L. REV. 11, on municipal aid to railway in building passenger station; in 4 TENN. L. REV. 26, on aid

While the proprietary power over public schools is not the explicit basis of the decision in *Gong Lum* v. *Rice*,[13] holding that it is not a denial of the equal protection of the laws to exclude Chinese children from public schools maintained for white children when schools for colored children are open to them in the neighborhood, Mr. Chief Justice Taft concludes his opinion by saying that "the decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." It is to be assumed that the power over public schools is not complete and that segregation is permitted only when schools are available for all. In the case at bar there was no school for colored children in the particular white school district in which the complainant lived, but the territorial districts for colored schools were not coterminous with those for white schools, and the exclusion was sustained on the assumption that there was a colored school in a convenient neighborhood.[14]

Statutes prohibiting the teaching of any subject in a foreign

to manufacturing; and in 23 COL. L. REV. 774, on recent social legislation involving use of police power and taxing power.

[13] 275 U. S. 78, 48 Sup. Ct. 91 (1927), considered in 16 CAL. L. REV. 346; 2 ST. JOHNS L. REV. 215; 13 ST. LOUIS L. REV. 156; and 37 YALE L. J. 518. The decision below is discussed in 3 NOTRE DAME LAW. 150. On the general subject, see Hoke F. Henderson, *Separation of Races in Schools*, 32 LAW NOTES 225.

[14] On Bible reading in the public schools, see Albert Levitt, *Compulsory Bible Reading in Public Schools*, 99 CENT. L. J. 77, 93; Laurence A. Stith, *Bible Reading in the Public Schools*, 32 LAW NOTES 225; and editorial discussion in 7 BOST. L. REV. 304; 11 CAL. L. REV. 183; 28 MICH. L. REV. 430; 11 MINN. L. REV. 675; and 3 NOTRE DAME LAW. 164.

On other issues relating to control of public educational institutions, see J. P. Chamberlain, *The Legislature and the Schools*, 11 AM. B. A. J. 492; Roy Robert Ray, *Powers and Authorities of the Governing Boards of State Colleges and Universities*, 17 KY. L. J. 15; George E. Sloan, *Discipline and State-Owned Educational Institutions*, 97 CENT. L. J. 187; Carlton E. Spencer, *The Legal Aspects of the Nonresident Tuition Fee*, 6 OR. L. REV. 332, published concurrently in 33 W. VA. L. Q. 350; Harold M. Stevens, *The School, the Church, and the State*, 12 MARQ. L. REV. 206; P. W. Viesselman and Cecil Bergenthal, *Private Financing of State University Buildings*, 2 DAK. L. REV. 288; and notes in 3 DAK. L. REV. 103, on authorizing non-profit association to erect dormitory on campus of state university; in 2 DAK. L. REV. 309, on legal status of state university; in 3 BOST. L. REV. 190 and 18 ILL. L. REV. 52, on exclusion of pupil from public school because of membership in secret society; in 16 VA. L. REV. 82, on excluding married pupils from public schools; and in 5 N. C. L. REV. 73, on prohibiting students from leaving the campus after 3:35 P. M.

language or teaching any language but English until after the pupil has completed the eighth grade were held unconstitutional in *Meyer* v. *Nebraska*[15] and *Bartels* v. *Iowa*[16] in their application to private schools. The fact that the question was not raised as to public schools may indicate a judgment that it would be permissible as to them.[17]

It necessarily follows from the decision in *Pierce* v. *Society of Sisters of Holy Name*[18] that the proprietary power over pub-

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[15] 262 U. S. 390, 43 Sup. Ct. 625 (1923), considered in Carl Zollman, *Personal Rights and the Fourteenth Amendment,* 8 MARQ. L. REV. 53; and notes in 12 CAL. L. REV. 136; 12 GEORGETOWN L. J. 123; 37 HARV. L. REV. 151; 18 ILL. L. REV. 394; 17 AM. J. INT. LAW 507; 9 IOWA L. REV. 123, 138; 22 MICH. L. REV. 248; 8 MINN. L. REV. 61; 3 OR. L. REV. 71; 9 ST. LOUIS L. REV. 68; 72 U. PA. L. REV. 46; 9 VA. L. REG. [N. S.] 378; and 33 YALE L. J. 215.

[16] 262 U. S. 404, 43 Sup. Ct. 628 (1923). The enforcement of drastic regulation of foreign language schools in Hawaii was enjoined in Farrington v. Tokushige, 273 U. S. 284, 47 Sup. Ct. 406 (1927), on which there is a note in 25 MICH. L. REV. 906.

[17] The power of a state to forbid the teaching of evolution in public schools is discussed in Richard H. Armstrong, *The Scopes Case,* 11 VA. L. REG. [N. S.] 193; Charles E. Carpenter, *Constitutionality of Tennessee's Anti-Evolution Statute,* 6 OR. L. REV. 130, reprinted in 61 AM. L. REV. 276; Ellahue Ansile Harper, *An Echo from the Scopes Trial,* 30 DICK. L. REV. 125; Robert S. Keebler, *Limitations upon the State's Control of Public Education: A Critical Analysis of State of Tennessee v. John Thomas Scopes,* 6 TENN. L. REV. 153; Jacob Mark Lashly, *Evolution and the Law,* 14 ST. LOUIS L. REV. 107; Blewett Lee, *Anti-Evolution Laws Unconstitutional,* 11 AM. B. A. J. 417, *Establishment of Religion,* 14 VA. L. REV. 100; W. A. Shumaker, *Legislative Power Over School Curriculum,* 29 LAW NOTES 85; Charles J. Turck, *State Control of Public School Curriculum,* 15 KY. L. J. 277; William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act,* 35 YALE L. J. 191; Dudley G. Wooten, *The Scopes Case,* 1 NOTRE DAME LAW. 11; and notes in 22 ILL. L. REV. 86; 2 IND. L. J. 483; 3 N. Y. L. REV. 261; 12 ST. LOUIS L. REV. 210; 5 TENN. L. REV. 242; and 11 VA. L. REG. [N. S.] 164.

[18] 268 U. S. 510, 45 Sup. Ct. 571 (1925), considered in 13 CAL. L. REV. 515; 98 CENT. L. J. 219; 25 COL. L. REV. 968; 20 ILL. L. REV. 378; 10 MARQ. L. REV. 94; 24 MICH. L. REV. 301; 9 MINN. L. REV. 69; 10 MINN. L. REV. 63; 4 TENN. L. REV. 216; 4 TEX. L. REV. 93; 74 U. PA. L. REV. 77; 11 VA. L. REG. [N. S.] 320; and 12 VA. L. REV. 146, 157. The decision below is noted in 7 BI-MON. L. REV. 217; 12 CAL. L. REV. 509; 97 CENT. L. J. 201; and 22 MICH. L. REV. 838. A discussion of the issue appears in Anonymous, *The Oregon Compulsory School Law,* 8 CONST. REV. 241; Pierre Crabités, *Islam and the Oregon Public School Law,* 12 AM. B. A. J. 753; and Clifford E. McDonald, *Compulsory Public School Attendance,* 7 MARQ. L. REV. 96.

lic schools does not go so far as to forbid competition from private schools, although it does not appear that the proponents of the statute urged any such claim. The statute compelled children of designated ages to go to public schools. The court held that children and parents have a constitutional right to a choice between public and private schools.

The question whether osteopaths and patients desiring osteopathic treatment may be excluded from a public hospital maintained by a city on land leased by the state under a provision reserving the use of the facilities to the faculty of the medical department of the state university and reserving to them control of the treatment of charity patients was answered in the affirmative in *Hayman* v. *Galveston*.[19] The excluded complainant did not set up rights as citizen of the state or of the United States, but Mr. Justice Stone observed that "there does not appear to be any substantial basis for urging that the action of the board abridges any privileges or immunities of a citizen of the United States." The claim that due process was denied by curtailing the privilege of practicing the complainant's calling was answered by saying that "however extensive that protection may be in other situations, it can not we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. * * *" [20] A case upholding the statutory exclusion of aliens from employment on public works was cited for the proposition that "it is not incumbent on the state to maintain a hospital for the private practice of medicine." In view of the fact that the case cited had gone on the broad ground that the state as proprietor may choose its employees as it will, it may be significant that Mr. Justice Stone invoked the narrower ground of reasonableness in sustaining the exclusion as against a complaint founded on the equal protection clause:

> "But it is argued that if some physicians are admitted to practice in the hospital all must be or there is a denial of the equal protection of the laws. Even assuming that the arbi-

[19] 273 U. S. 414, 47 Sup. Ct. 363 (1927). A decision on the same point is the subject of comment in 13 VA. L. REV. 496.

[20] *Ibid.* 416, 47 Sup. Ct. at 364.

> trary exclusion of some physicians would have that legal consequence in the circumstances of this case, the selection complained of was based upon a classification not arbitrary or unreasonable on its face. * * * We cannot say that a regulation excluding from the conduct of a hospital the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws." [21]

The limitation in the Texas constitution that "no preference shall ever be given by law to any schools of medicine" was held to be confined to the determination of the qualifications of those to be admitted to practice, and to have no bearing on the selection of participants in the work of conducting a public hospital or educational enterprise.

The question whether the proprietary power over public highways may be exercised so as to put private carriers for hire under the jurisdiction of the railroad commission and thereby turn them into public carriers subject to rate regulation and analogous requirements was thought by a majority of the Supreme Court to be involved in *Frost & Frost Trucking Co.* v. *Railroad Commission,*[22] and was decided in the negative. The case came to the Supreme Court on writ of error from a decision of the California court upholding a commission order forbidding complainants from carrying for hire until they had obtained the certificate of necessity and convenience prescribed by the statute. The opinion of the state court had said that the power of the state to forbid private business on the highways includes the power to attach such conditions as it sees fit to a grant of per-

[21] *Ibid.* 417, 47 Sup. Ct. at 364.

[22] 271 U. S. 583, 46 Sup. Ct. 605 (1926), discussed in David E. Lilienthal and Irwin S. Rosenbaum, *Motor Carrier Regulation by Certificates of Convenience and Necessity,* 36 YALE L. J. 163; S. Chesterfield Oppenheim, *Unconstitutional Conditions and State Police Power,* 26 MICH. L. REV. 176; and notes in 6 BOST. L. REV. 259; 40 HARV. L. REV. 131; 21 ILL. L. REV. 380; and 11 MINN. L. REV. 555.

mission to use the highways for such business. Mr. Justice Sutherland insisted that this brought before the court the question whether private carriers may thus be forced to become public carriers or quit. He reviewed the cases on unconstitutional conditions and held that the state may not require as a condition of the use of the roads a transformation from private to public carrier which it may not directly command. He called the regulation provided by the Act and sanctioned in the opinion of the state court not in any "real sense a regulation of the use of the public highways," but "a regulation of the business of those who are engaged in using them" and deemed the purpose to be that of protecting common carriers by controlling competitive conditions. He did not pass on the precise question whether a certificate of convenience may be prescribed for private carriage, though he assumed, without deciding, that the state may close the highways altogether to carriage for hire.[23] In a dissent in which Mr. Justice Brandeis concurred, Mr. Justice Holmes excluded from consideration any problem of making private carriers common carriers or regulating rates and accounts, but said of the power of the state:

"* * * I see nothing to prevent its going to the point of

[23] For articles treating of the regulation of motor vehicles on the public highways, see Richard Capel Beckett, *The Extent to Which Mississippi Railroad Commission May Regulate and Control Operation of Busses,* 2 MISS. L. REV. 416; William Chamberlain, *Motor Bus Regulation in Iowa,* 9 IOWA L. REV. 26; John J. George, *Principles of Motor Carrier Regulation,* 63 AM. L. REV. 72; *Regulation of Motor Car Service and Rates,* 3 U. CIN. L. REV. 269; *Motor Carrier Regulation in Missouri,* 40 LAW SERIES MO. BUL. 23; *Factors in Granting Motor Carrier Certificates of Public Convenience and Necessity,* 5 IND. L. J. 243; Ford P. Hall, *Certificates of Convenience and Necessity,* 28 MICH. L. REV. 107, 276; W. S. Ingram and M. S. Breckenridge, *Motor Bus Competition with Established Service,* 9 IOWA L. REV. 268; Charles P. Light, Jr., *The Supreme Court and Commerce by Motor Vehicle,* 7 N. C. L. REV. 268; David E. Lilienthal and Irwin S. Rosenbaum, *Motor Carrier Regulation in Illinois,* 22 ILL. L. REV. 47; Irwin S. Rosenbaum and David E. Lilienthal, *Motor Carrier Regulation in Ohio,* 1 U. CIN. L. REV. 288; *Motor Carrier Regulation: Federal, State and Municipal,* 26 COL. L. REV. 854, reprinted in 62 AM. L. REV. 689; *The Regulation of Motor Car Vehicles in Pennsylvania,* 75 U. PA. L. REV. 696; William A. Schnader, *The Taxicab—Its Service and Facilities,* 116 ANN. AM. ACAD. POL. SCI. (No. 205) 292; J. Morgan Stevens, *Regulation of Common Carriers of Passengers by Bus,* 2 MISS. L. REV. 404; and Delos F. Wilcox, *Public Regulation of Motor Bus Service,* 116 ANN. AM. ACAD. POL. SCI. (No. 205) 107.

> requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. * * *" [24]

There is nothing in the majority opinion that indicates dissent from this. Mr. Justice McReynolds in his separate dissent goes much further when he says:

> "* * * Having built and paid for the roads, California certainly has the general power of control. Plaintiffs in error are without constitutional right to appropriate highways to their own private business as carriers for hire. And if, in so many words, the Legislature had said that no intrastate carriers for hire except public ones shall be permitted to operate over the state roads it would have violated no federal law. So far as the rights of plaintiffs in er-

[24] *Supra* note 22, at 601, 46 Sup. Ct. at 610.

For discussion of regulation of motor vehicles, see notes in 25 COL. L. REV. 1081, on holding one to be a common carrier who carries solely under contract with United States from wharf to bonded warehouse; in 32 YALE L. J. 841, on holding one who rents trucks to be a common carrier; in 23 MICH. L. REV. 424, on operator of motor vehicles as common carrier; in 14 GEORGETOWN L. J. 278, reprinted in 61 AM. L. REV. 112, on taxicabs; in 1 TEX. L. REV. 475, on power to regulate jitneys; in 25 MICH. L. REV. 81, 27 MICH. L. REV. 825, and 1 TEX. L. REV. 475, on regulating use of streets by jitneys; in 24 COL. L. REV. 88, on regulating vehicles for hire on main streets; in 9 CORN. L. Q. 67, on forbidding motor busses to stop in villages; in 22 MICH. L. REV. 174, on necessity of express authority to prohibit through busses from stopping; in 16 CAL. L. REV. 336, on conflict in traffic regulation between statute and ordinance; in 15 KY. L. J. 351, on forbidding use of streets by private bus for taxi stand; in 37 HARV. L. REV. 377, on regulation of motor busses on streets; in 6 TEX. L. REV. 233, on power of city to forbid all use of streets by carriers for hire between cities; in 12 MINN. L. REV. 73, on requiring private carrier for hire to get permit to use roads; in 8 MINN. L. REV. 170, on requiring license for interurban motor bus; in 6 N. C. L. REV. 347 and 34 W. VA. L. Q. 198, on giving preference to existing carriers in granting permits to operate motor busses; in 1 TEX. L. REV. 476, on regulating commercial trucks but not farm trucks; in 21 ILL. L. REV. 743, on requiring red rear lights on automobiles; in 13 GEORGETOWN L. J. 180, on automobile registration acts; in 10 MINN. L. REV. 531, on revocation of automobile license without hearing; in 13 VA. L. REV. 246, on vesting arbitrary discretion to prescribe parking rules; in 4 U. CIN. L. REV. 231, on validity of parking ordinances; and in 14 MINN. L. REV. 576, 5 NOTRE DAME LAW. 227, and 15 ST. LOUIS L. REV. 302, on forbidding parking in the Chicago Loop.

ror are affected, nothing more serious than that has been done.

"The States are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution." [25]

All the Court had concurred in *Michigan Public Utilities Commission* v. *Duke* [26] where it was held to be an offense against the commerce clause and a denial of due process to require an interstate private motor carrier to become a public carrier. Due process considerations seem to be invoked by Mr. Justice Butler quite apart from the commerce clause when he says:

"Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do

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[25] *Supra* note 22, at 602, 46 Sup. Ct. at 610.

The fact that "the highways are public property" was adduced by Mr. Justice Brandeis in Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702 (1927), in sustaining a tax on motor transportation companies graduated by the capacity and number of vehicles used even as against a company that adduced the commerce clause because it was engaged exclusively in interstate commerce. The decision was confined to an exaction for the maintenance and repair of the highways and for the administration and enforcement of the highway laws.

A tax of one cent per mile of highway traversed by motor busses engaged in interstate commerce was sustained in Interstate Busses Corporation v. Blodgett, 276 U. S. 245, 48 Sup. Ct. 230 (1928), for the reason that it was exacted for the use of the highways and was applied to their maintenance. The tax was confined to those engaged in interstate commerce but was not shown to be heavier than another tax imposed on intrastate carriers.

A license fee that was not devoted to the maintenance of the highways was declared unconstitutional under the commerce clause in Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. 503 (1928).

A police regulation limiting the combined load of motor trucks to 16,500 pounds was sustained in Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548 (1927), on the finding that weight in excess of that "is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair." This consideration was said to outweigh the possible effect of the statute in suppressing interstate motor transportation which competed with parallel steam railroads.

[26] 266 U. S. 570, 45 Sup. Ct. 191 (1925), discussed in 38 HARV. L. REV. 980 and 34 YALE L. J. 675.

consistently with the due process of law clause of the Fourteenth Amendment. * * *" [27]

The requirement that persons desiring to operate motor busses in intrastate commerce must secure a certificate of convenience and necessity is sustained in *Interstate Busses Corporation* v. *Holyoke Street Railway* [28] at least to the extent that no one who has not applied for such a certificate can operate. Mr. Justice Butler says:

"There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. * * * The terms of the Act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department.

"Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause." [29]

In sustaining the requirement that operators of motor vehicles for hire on the streets of first class cities give security for the payment of judgments obtained against them for personal

[27] *Ibid.* 577, 45 Sup. Ct. at 193.

[28] 273 U. S. 45, 47 Sup. Ct. 298 (1927), considered in 26 MICH. L. REV. 115.

[29] *Ibid.* 52, 47 Sup. Ct. at 300.

Over the dissent of Mr. Justice McReynolds it was held in Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324 (1925), and Bush & Sons Co. v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326 (1925), that a certificate of convenience and necessity cannot be required of motor carriers engaged exclusively in interstate commerce. There are statements in the opinion of Mr. Justice Brandeis that would indicate that such a requirement might depend for its due-process validity upon other considerations than the special proprietary power over highways. He says that the "primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." "It determines," he adds, "not the manner of use, but the persons by whom the highway may be used." "Thus," he continues, "the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce." If this were to be taken at its face value, the state could not regulate competition on the highways where it could not regulate similar competition elsewhere. This would have no application to public carriers, but it might easily have application to private carriers.

injuries caused by the operation of their cars, Mr. Justice Sutherland in *Packard* v. *Banton* [30] laid chief stress on the special power possessed over public highways:

> "* * * The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper. * * *" [31]

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[30] 264 U. S. 140, 44 Sup. Ct. 257 (1924), discussed in 22 MICH. L. REV. 717 and 2 TEX. L. REV. 523. On similar cases, see 21 ILL. L. REV. 745; 22 ILL. L. REV. 676; and 71 U. PA. L. REV. 278.

On statutes requiring compensation insurance from automobilists, see Minor Bronough, *Compulsory Automobile Liability Insurance,* 29 LAW NOTES 207; James R. Caskie, *Compulsory Automobile Insurance,* 11 VA. L. REG. [N. S.] 449; J. P. Chamberlain, *Protection for Automobile Owners,* 11 AM. B. A. J. 451; Wayland H. Elsbee and Harold Hooper Roberts, *Compulsory Insurance Against Motor Vehicle Accidents,* 76 U. PA. L. REV. 690; W. J. Heyting, *Automobiles and Compulsory Liability Insurance,* 16 AM. B. A. J. 362; Henry Swift Ives, *Compulsory Liability Insurance, With Special Reference to Automobiles,* 10 AM. B. A. J. 697, reprinted in 10 VA. L. REG. [N. S.] 666; Robert S. Marx, *Compulsory Automobile Insurance,* 11 AM. B. A. J. 731; *Compulsory Automobile Insurance,* 1 U. CIN. L. REV. 445, *Compulsory Automobile Insurance—Compensation, Not Liability Insurance Needed,* 16 NAT. MUN. REV. 503; *Compulsory Compensation Insurance,* 25 COL. L. REV. 164; MacCormack Snow, *Some Legal Aspects of Compulsory Automobile Insurance,* 6 OR. L. REV. 193; Edward C. Stone, *Some Views on Compulsory Automobile Insurance,* 13 AM. B. A. J. 151; and notes in 9 BOST. L. REV. 212; 10 BOST. L. REV. 72; 27 COL. L. REV. 314; 30 COL. L. REV. 108; 20 ILL. L. REV. 813; 24 MICH. L. REV. 585; 10 MINN. L. REV. 149, 174; and 35 YALE L. J. 110.

Statutory or common law liabilities of owners of automobiles for injuries due to faults of another are considered in Joseph P. Chamberlain, *Automobiles and Vicarious Liability,* 10 AM. B. A. J. 788; W. J. Heyting, *Automobiles and Vicarious Liability,* 16 AM. B. A. J. 285; and notes in 29 COL. L. REV. 210; 30 COL. L. REV. 563; 38 HARV. L. REV. 512; 26 MICH. L. REV. 584; 28 MICH. L. REV. 73; and 2 WIS. L. REV. 38. Considerations of extra-territoriality in imposing liability are discussed in 43 HARV. L. REV. 493; 27 MICH. L. REV. 462; and 2 So. CAL. L. REV. 304. In 4 ALA. L. REV. 48, is a note on giving injured party right to sue insurance company on policy running to defendant owner of car.

[31] *Supra* note 30, at 144, 44 Sup. Ct. at 259.

The requirement of an indemnity bond arose in several cases under the commerce clause. In Michigan Public Utilities Commission v. Duke, *supra* note 26, Mr. Justice Butler laid down that the requirement of a bond covering the cargo of a private carrier engaged exclusively in interstate commerce is too great a burden on that commerce to be sanctioned. There was no reference to the propriety of such a bond from one concededly a voluntary public carrier.

Control over the highways of the state was held in *Hess* v. *Pawloski*[32] to go so far as to include a requirement that use of the highways by a non-resident automobilist shall be a sufficient basis for initiating suits for injuries growing out of the operation of the car within the state by service of process on the registrar of motor vehicles, provided notice thereof is sent by registered mail to the non-resident by the plaintiff, and the defendant's return receipt and plaintiff's affidavit of compliance with the requirement are attached to the writ and entered with the declaration. Mr. Justice Butler did not explicitly refer to the proprietary interest of the state as a justification for the regulation, but called attention to an earlier case sanctioning the power of the state to exclude non-resident automobilists until they file an appointment of the secretary of state as agent to accept process,

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That a bond to indemnify others than passengers could be required of a public carrier engaged exclusively in interstate commerce is declared by Mr. Justice Brandeis in Sprout v. South Bend, *supra* note 25, without objection from his colleagues. The remark was possibly *obiter,* since the ordinance was held void because of the license fee demanded. Mr. Justice Brandeis suggests a difference between the protection of things outside the bus and things inside when he says that there is no need to inquire whether the insurance here required was too broad in scope, since the ordinance is void for other reasons.

So also in Clark v. Poor, *supra* note 25, Mr. Justice Brandeis had earlier recognized the possibility of the same distinction. Since he found the insurance feature of the statute not in issue, he declares, at page 558, that there is "no occasion to consider whether * * * liability insurance, as distinguished from insurance on the interstate cargo, may be required of a carrier engaged wholly in interstate commerce."

[32] 274 U. S. 352, 47 Sup. Ct. 632 (1927), considered in Harry John Meleski, *The Case of Hess v. Pawloski,* 7 BOST. L. REV. 273; and notes in 41 HARV. L. REV. 94; 31 LAW NOTES 82; 12 MARQ. L. REV. 236; 26 MICH. L. REV. 201; 2 TEMP. L. Q. 61; 1 U. CIN. L. REV. 486; 76 U. PA. L. REV. 93; 34 W. VA. L. Q. 283; and 4 WIS. L. REV. 307. The case in the court below is discussed in Austin Wakeman Scott, *Jurisdiction over Nonresident Motorists,* 39 HARV. L. REV. 563, reprinted in 60 AM. L. REV. 403; Edward W. Hinton, *Substituted Service on Non-Residents,* 20 ILL. L. REV. 1, reprinted in 59 AM. L. REV. 592; Thomas F. Konop, *Service of Process on Nonresident Motorists,* 2 NOTRE DAME LAW. 181; and notes in 5 BOST. L. REV. 46; 25 COL. L. REV. 204; 38 HARV. L. REV. 111; 9 MINN. L. REV. 362, 381; 73 U. PA. L. REV. 171; 11 VA. L. REV. 144; and 34 YALE L. J. 415. For other notes on the same problem see 9 BOST. L. REV. 121; 30 COL. L. REV. 129; 15 CORN. L. Q. 259; 2 DAK. L. REV. 312; 43 HARV. L. REV. 493, 949; 14 MINN. L. REV. 82; 9 OR. L. REV. 376; 2 ST. JOHNS L. REV. 333; 4 ST. JOHNS L. REV. 298; 78 U. PA. L. REV. 771; 15 VA. L. REV. 69; 4 WIS. L. REV. 189; and 35 YALE L. J. 113.

and said that "having the power so to exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served."

Wuchter v. *Pizzutti*[33] held that the statute must provide in terms for some adequate method of assuring the non-resident defendant of actual notice of the suit. Mr. Justice Stone thought the case should be remanded with leave to the state court to determine whether such notice was required by the statute. Justices Brandeis and Holmes thought that failure of the defendant to raise the issue in the court below precluded him from raising it here; but the majority reversed the judgment and ended the cause.[34]

Cases sanctioning the imposition on street railroads of the

[33] 276 U. S. 13, 48 Sup. Ct. 259 (1928), discussed in 16 CAL. L. REV. 428; 28 COL. L. REV. 667; 13 CORN. L. Q. 608; 16 GEORGETOWN L. J. 491; 27 MICH. L. REV. 219; 12 MINN. L. REV. 753; 6 N. C. L. REV. 481; 3 NOTRE DAME LAW. 267; 3 ST. JOHNS L. REV. 155; 14 ST. LOUIS L. REV. 62; 2 TEMP. L. Q. 275; 63 U. S. L. REV. 445; 3 U. CIN. L. REV. 85; and 5 WIS. L. REV. 99. The case in the court below or similar cases are considered in 18 CAL. L. REV. 195; 25 MICH. L. REV. 538; 13 MINN. L. REV. 377; and 39 YALE L. J. 126. In 14 MINN. L. REV. 287 is a note on an amendment to the New Jersey statute involved in Wuchter v. Pizzutti, which required notice to the defendant and was given retroactive effect to validate the statute.

[34] For consideration of various legal issues arising out of public ownership and management of streets and similar property see Leon Goodman, *The Validity of Ordinances Permitting the Parking of Automobiles,* 10 VA. L. REG. [N. S.] 545; William H. Lloyd, *The Parking of Automobiles,* 77 U. PA. L. REV. 336; W. A. Shumaker, *Parades,* 28 LAW NOTES 105; and notes in 2 N. C. L. REV. 106, on municipal control of grade crossings; in 28 MICH. L. REV. 205, on right to convert canal area into a street; in 4 WASH. L. REV. 195, on right to grant use of street for market; in 11 CAL. L. REV. 436, 24 COL. L. REV. 547, and 37 HARV. L. REV. 274, on power to vacate streets and alleys; in 28 COL. L. REV. 509, 41 HARV. L. REV. 540, 2 ST. JOHNS L. REV. 90, and 37 YALE L. J. 996, on power to change street names and numbering; in 9 BOST. L. REV. 124, on regulation of speaking on public ways; in 73 U. PA. L. REV. 212, on prohibiting distribution of circulars on streets; in 17 NAT. MUN. REV. 700 and 18 NAT. MUN. REV. 101, on special assessment for ornamental street lighting; in 31 W. VA. L. Q. 222, on compulsory repaving for aesthetic purposes; in 14 VA. L. REV. 131, on requiring abutters to remove snow; in 12 CAL. L. REV. 316 and 29 W. VA. L. Q. 207, on scope of dedication of land to public; in 11 KY. L. J. 242 and 34 YALE L. J. 802, on adverse possession or prescription against a city; in 9 MINN. L. REV. 479, on acquisition by abutter of easement of access to street; in 9 MARQ. L. REV. 124, on right of abutter to park; and in 39 YALE L. J. 1208, on restricting use of public market to producers of farm products.

duty to pave that part of the street occupied by their tracks notwithstanding heavy expense at a time when they are losing money [35] are doubtless to be classed as illustrations of the exercise of proprietary powers, though they are more conveniently treated along with other cases involving the regulation of public utilities.

While requirements to remove grade crossings [36] or to maintain a flagman [37] or to demolish a viaduct over the highway and put tracks at grade across tracks of another line [38] usually involve regulation of the highways owned by the public, there is no indication that they depend for their justification upon the possession of a proprietary power. Presumably the public utilities could be compelled to make their ways safe if all highways were privately owned.

The control of the state over fish and wild game was referred to in several cases involving issues of taxation and/or the commerce clause. The severance tax sustained in *Lacoste* v. *Department of Conservation* [39] had been called by the state court a police regulation, and not a revenue act. In approving of this, Mr. Justice Butler said:

> "* * * Our examination of this act discloses no reason why the decision of the state court should be disturbed. The legislation is a valid exertion of the police power of the State to conserve and protect wild life for the common benefit. It is within the power of the State to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership. * * *" [40]

Earlier he had declared:

"The wild animals within its borders are, so far as capable

[35] Durham Public Service Co. v. Durham, 261 U. S. 149, 43 Sup. Ct. 290 (1923); Fort Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 47 Sup. Ct. 595 (1927).

[36] Lehigh Valley R. R. v. Board of Public Utility Commissioners, 278 U. S. 24, 49 Sup. Ct. 69 (1928).

[37] Nashville, Chattanooga & St. Louis Ry. v. White, 278 U. S. 456, 49 Sup. Ct. 189 (1929).

[38] New Orleans Public Service, Inc. v. New Orleans, 281 U. S. 682, 50 Sup. Ct. 449 (1930).

[39] 263 U. S. 545, 44 Sup. Ct. 186 (1924), noted in 22 MICH. L. REV. 619. The decision below is discussed in George Vaughan, *The Severance Tax*, 7 BUL. NAT. TAX ASS'N 243.

[40] *Ibid.* 550, 44 Sup. Ct. at 188.

of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."[41]

This was quoted by Mr. Justice Butler in *Foster-Fountain Packing Co.* v. *Haydel*[42] in which, however, after citing an earlier case, he also said:

"* * * These and many other cases show that the State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people. * * *"[43]

The opinion recognized that the state might have confined the taking of shrimp to acquisition for home consumption, but declared that it is an offense against the commerce clause to prohibit the exportation of unshucked shrimp when those with shucks off are freely allowed to migrate. There is a touch of due process notion in the declaration that "those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause." Mr. Justice McReynolds in dissenting observed:

"* * * How wild life may be utilized in order to advantage her own citizens is for the producing State to determine. To enlarge opportunity for employment is one way, and often the most effective way, to promote their welfare."[44]

In sustaining a Maryland statute which required oyster packers to turn ten per cent of their shells over to the state, Mr. Justice McReynolds in *Leonard & Leonard* v. *Earle*[45] did not refer to

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[41] *Ibid.* 549, 44 Sup. Ct. at 187.

[42] 278 U. S. 1, 49 Sup. Ct. 1 (1928), discussed in 29 COL. L. REV. 355; 14 CORN. L. Q. 245; 17 GEORGETOWN L. J. 73; 23 ILL. L. REV. 705, 806; 14 IOWA L. REV. 356; 8 OR. L. REV. 280, 294; 7 TEX. L. REV. 473; 3 U. CIN. L. REV. 64, 85; 15 VA. L. REV. 155, 171; and 35 W. VA. L. Q. 182.

[43] *Ibid.* 11, 49 Sup. Ct. at 4.

[44] *Ibid.* 15, 49 Sup. Ct. at 5.

[45] 279 U. S. 392, 49 Sup. Ct. 372 (1929).

any special power over oysters, but justified the exaction as a proper tax in kind.[46]

Power to forbid fishing carries with it power to forbid the use of nets, traps, or seines. This was reiterated in *Miller* v. *McLaughlin*[47] in which Nebraska was held to have control over that part of the Mississippi River within her territory and to be thereby entitled to prohibit possession of the illicit implements notwithstanding the allegation of the would-be fisherman that he intended to use them only on the Iowa side.[48]

As pointed out in cases already reviewed,[49] the rights of the state and of riparian owners in land under navigable waters and the power of the state to part with its sovereign or proprietary rights are matters of state law with which the Supreme Court will interfere only to prevent state courts or legislatures from defeating the rights established by preëxisting state law as that is made manifest to the Supreme Court. In *Fox River Paper Co.* v. *Railroad Commission*[50] the Supreme Court found nothing wrong in the state court's decision that under the law of Wisconsin the consent of the state is necessary for the construction of a dam or bridge across a navigable stream. One who had built a dam without the consent of the state, long after the statute forbade such unlicensed construction, sought to get permission to repair the dam without complying with the requirement that the applicant should file a consent to the condition that the dam might be taken by the state under eminent domain upon payment of the cost of reproduction of the structures and the value of the dam site and flowage rights as determined by the state commission at the time of granting the permit. The commission declined to grant the permit and insisted that it was without jurisdiction in the matter until the required consent was filed. In sustaining this refusal, Mr. Justice Stone, without en-

[46] On statute giving oyster planter two years in which to remove oysters from natural bed innocently leased to him, see 16 VA. L. REV. 303.

[47] 281 U. S. 261, 50 Sup. Ct. 296 (1930).

[48] On the right to fish in navigable waters, see 12 IOWA L. REV. 411, 451; on prohibiting aliens from fishing, 24 MICH. L. REV. 300; on legislation affecting rights of aliens, 23 COL. L. REV. 388.

[49] See *supra*, pages 16-18.

[50] 274 U. S. 651, 47 Sup. Ct. 669 (1927), discussed in 1 DAK. L. REV. 143; 12 MARQ. L. REV. 80; and 2 WASH. L. REV. 248.

tering upon the logic of "unconstitutional conditions" said briefly that compliance with the condition "is the price which plaintiffs must pay to secure the right to maintain their dam." [51]

The claim that the state denied due process by abandoning a canal and thereby depriving lessees of the surplus water granted by their leases from the state was raised in *Kirk* v. *Maumee Valley Electric Co.*,[52] and was answered by pointing out that the lease originally imposed on the state no duty to maintain the canal. The leases provided for their abrogation whenever withdrawal by lessees interfered with navigation, and the state court had long held that "they were only incidental to the use and maintenance of the canal for purposes of navigation; that they imposed no obligation on the state to maintain the canal either for navigation or other purposes and when abandoned by the state the right of lessees to surplus water ceased." [53] They had been so interpreted by the Supreme Court in the time of Mr. Chief Justice Waite. Some of the leases here in question, however, were made after navigation had ceased. It was urged that such leases could not be construed to be subject to the requirements of navigation or to a power to abandon the canal for navigation, but Mr. Justice Stone answered that mere non-user by the public is not abandonment and insisted that there had been no change in state policy to import into these leases a relinquishment of the power to abandon the canal.

The grant in *Kirk* v. *Providence Mill Co.*[54] had been given as compensation for a release of all claims against the state in favor

[51] On legislative power relating to streams see Edward F. Treadwell, *Modernizing the Water Law,* 17 CAL. L. REV. 1; Lucien Shaw, *The Development of the Law of Waters in the West,* 10 CAL. L. REV. 443; Samuel C. Wiel, *The Pending Water Amendment to the California Constitution, and Possible Legislation,* 16 CAL. L. REV. 169, 257; *The Recent Attorneys' Conference on Water Legislation,* 17 CAL. L. REV. 197; Dwight Williams, *The Power of the State to Control the Use of Its Natural Resources,* 11 MINN. L. REV. 129, 233; and notes in 15 CAL. L. REV. 229, on authorizing storage of water from river; in 40 HARV. L. REV. 1023, on legislative limitation of riparian rights; and in 14 VA. L. REV. 664, on earth removed by levee board during emergency.

Articles and notes on legislative power over land under water are listed in note 44, *supra,* page 16.

[52] 279 U. S. 797, 49 Sup. Ct. 507 (1929).

[53] *Ibid.* 803, 49 Sup. Ct. at 509.

[54] 279 U. S. 807, 49 Sup. Ct. 511 (1929).

of a riparian owner, but this was held not to affect the scope of the grant.

From the foregoing review it appears that few of the objections to the exercise of governmental and proprietary powers are sustained. Indeed, of the various cases in which legislation or administrative action has been found to be unconstitutional, only *Nixon* v. *Herndon*[55] represents a complete frustration of an attempted exercise of governmental or proprietary powers. This declared that a state may not exclude negroes from a party primary. *Connally* v. *General Construction Co.*[56] applied to an exercise of proprietary power the canon that penal statutes must not be too indefinite. *Frost & Frost Trucking Co.* v. *Railroad Commission*[57] and *Michigan Public Utilities Commission* v. *Duke*[58] held that control over highways cannot be wielded to turn a private carrier into a public carrier. *Wuchter* v. *Pizzutti*[59] holds that statutes providing for substituted service on non-resident automobilists must safeguard their natural desire to receive actual notice. *Wolff Packing Co.* v. *Court of Industrial Relations*[60] frustrated an effort at compulsory arbitration of industrial disputes, but it was here included only for its *dictum* in support of wide powers of states and municipalities to undertake business enterprises. *Pierce* v. *Society of Sisters of Holy Name*[61] forbade the statutory extinction of private schools, but this is related only obliquely to governmental and proprietary powers. *Foster-Fountain Packing Co.* v. *Haydel*[62] held that the power to conserve shrimps could not be used to regulate interstate commerce when the purpose and result were to further not home consumption but home industry in preparing the shrimps for market.[63] All of these cases except *Nixon* v. *Herndon*[64] be-

[55] 273 U. S. 536, 47 Sup. Ct. 446 (1927), reviewed *supra*, pages 10-11.
[56] *Supra* note 2.
[57] *Supra* note 22.
[58] *Supra* note 26.
[59] *Supra* note 33.
[60] *Supra* note 9.
[61] *Supra* note 18.
[62] *Supra* note 42.
[63] So also in Buck v. Kuykendall, *supra* note 29, and Bush & Sons Co. v. Ma-

[64] *Supra* note 55.

long primarily in other pockets than that with which we are now concerned. They show that the power of the state to run its own public affairs is subject to limitations when it involves coercion over the private affairs of individuals, but they involve no serious restraint on strictly public business or government.

In the remaining cases in which statutes or orders were declared unconstitutional, the result was due to the sanction of a governmental power which precluded the exercise of other powers. In *Missouri, Kansas & Texas Ry.* v. *Oklahoma*[65] a city was held to its contract not to charge to a railroad the cost of extending a highway under its tracks. In *Railroad Commission* v. *Los Angeles Railway Corporation*[66] and *Denney* v. *Pacific Telephone & Telegraph Co.*,[67] contracts relied on to sustain rates concededly confiscatory were thought by the Supreme Court to have been abrogated by valid action of the state. Similarly in *Appelby* v. *New York*[68] and *Appelby* v. *Delaney*[69] a city was precluded from regulating land under navigable water only because the Court found that it had successfully surrendered its power to do so by its previous grant. The significance of these cases lies not in any restraint on the exercise of governmental powers, but in their illustration of the power of the Supreme Court of the United States to determine for itself whether a state or city has tied its hands or has relinquished a right formerly possessed.

Where the private litigant relied on contract rights, as in the cases involving land under water and the effort to make a rail-

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loy, *supra* note 29, it was found obnoxious to the commerce clause to require a certificate of necessity and convenience as a prerequisite to interstate commerce by motor carrier. Michigan Public Utilities Commission v. Duke, *supra* note 31, held that a private carrier engaged exclusively in interstate commerce cannot be required by a state to give a bond conditioned on safe delivery of the cargo.

[65] 271 U. S. 303, 46 Sup. Ct. 517 (1926), reviewed in 17 VA. L. REV. 529, at 541 [*supra,* page 13].

[66] 280 U. S. 145, 50 Sup. Ct. 71 (1929), reviewed in 17 VA. L. REV. 529, at 552-553 [*supra,* pages 24-25].

[67] 276 U. S. 97, 48 Sup. Ct. 223 (1928), reviewed in 17 VA. L. REV. 529, at 554 [*supra,* page 26].

[68] 271 U. S. 364, 46 Sup. Ct. 569 (1926), reviewed in 17 VA. L. REV. 529, at 544-546 [*supra,* pages 16-18].

[69] 271 U. S. 403, 46 Sup. Ct. 581 (1926), reviewed in 17 VA. L. REV. 529, at 544-546 [*supra,* pages 16-18].

road pay for an underpass, it has long been the function of the Supreme Court to reject a state court's view of state law in order to prevent circumvention of the protection proffered by the obligation-of-contracts clause. Where, however, it is a city which relies on a contract which the carrier says has been abrogated by the state, it is a very different thing for the Supreme Court to determine the matter for itself in advance of an adjudication by the state court. Such action of the majority in the *Los Angeles* case evoked dissent from Justices Holmes, Brandeis, and Stone. They also objected to the summary ending of the litigation in *Wuchter* v. *Pizzutti,*[70] though they did not contest the necessity of notice to the non-resident. Justices Holmes and Brandeis would have decided *Connally* v. *General Construction Co.,*[71] on a ground that would not involve the constitutional issue. They also thought that the point decided by the majority was not really involved in *Frost & Frost Trucking Co.* v. *Railroad Commission.*[72] Mr. Justice McReynolds went even further and insisted that power over the highways includes power to exclude private carriers for hire. In *Foster-Fountain Packing Co.* v. *Haydel,*[73] also, he was alone in dissent and would have allowed a state to use its power over shrimps to promote the domestic industry of removing their shucks. Justices Holmes and Sutherland would have allowed the suppression of the teaching of subjects in foreign languages in elementary private schools, which the majority declared unconstitutional in *Meyer* v. *Nebraska*[74] and *Bartels* v. *Iowa.*[75]

These divisions of opinion, taken by themselves, do not appear very significant. To some extent, however, they forecast the divisions that we shall find in other cases in which the contrasts between opposing points of view help to explain why some members of the United States Senate have thought that the meaning of the Constitution depends upon the outlook of the judges

[70] *Supra* note 33.
[71] *Supra* note 2.
[72] *Supra* note 22.
[73] *Supra* note 42. Mr. Justice McReynolds also dissented alone in Buck v. Kuykendall, *supra* note 29, and Bush & Sons Co. v. Maloy, *supra* note 29.
[74] *Supra* note 15.
[75] *Supra* note 16.

rather than upon the meaning of the Constitution. Such a self-evident contradiction might move one to emulate the late Mr. Chief Justice White and say that the very statement of the proposition is its own refutation. It may be so. We shall be in a better position to pass judgment upon it when we have reviewed the constitutional issues that have caused more striking alignments, and have compared the respective positions of the various members of the Court in cases that fall in widely different categories.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—III [1]

II. PERSONAL CONDUCT AND CONDITION

DOUBTLESS most exercises of police power have to do directly or indirectly with personal conduct in some form. The cases to be treated here involve for the most part conduct unrelated to business activity and to property and financial interests. While some of the legislation might be questioned as a deprivation of property even if there were no constitutional protection of liberty, it all falls more directly under the rubric of deprivation of liberty. Scholars and judges have from time to time sought to determine the scope of the personal liberty that may claim constitutional protection under the Fourteenth Amendment. The results of the cases seem to show pretty clearly that the quest for a definition of liberty is not likely to prove fruitful, unless the definition goes to the limit of freedom from any and all restraint. It is no longer worth while to spend time in considering whether there are liberties not within the assumed contemplation of the official progenitors of the Fourteenth Amendment. When restraints on liberty are sanctioned by the court, it is because the restraints are approved rather than because the liberty involved is not the kind of liberty that may claim the right to raise a constitutional issue. This, however, does not mean that the justifications for restraint are unrelated to the particular freedom that is curtailed. Conceivably we might rank various liberties in some order of sanctity distinct from any consideration of the degree of restraint or the justifications therefor. Yet it is likely that most statements of particularistic liberties would involve inclusion of a particular restraint or be expressed in terms of the restraint. Often the indication of the restraint would point to the considerations involved in its justification. So it may well be precarious to seek to set up separate categories of particular liberties and assign to them intrinsic

[1] For previous instalments, see 17 VA. L. REV. 529-556, 653-675.

values than can be weighed or measured in some abstract scheme. Courts do not adjudicate abstract values. They decide whether men can escape from paying money or from going to jail. The mundane path they travel is the one we seek to trace.

The New York Criminal Anarchy statute, originally passed in 1902, forbids advocacy of criminal anarchy and defines the offense as advocating, advising or teaching the duty, necessity or propriety "of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." A conviction under this statute was sustained in *Gitlow* v. *New York*,[2] by a vote of seven to two. The indictment was based upon the publication of the so-called Left-Wing Manifesto and nothing more. The evidence consisted of the manifesto and the defendant's responsibility for its publication. There was no evidence of any concrete result flowing from the publication or of circumstances showing the likelihood of such a result. Mr. Justice Holmes in dissenting adduced the standard of the present-danger test which he had announced in opinions on the Espionage Act and insisted that the words here were not used in such circumstances and were not of such a nature as to create a clear and present danger that they will bring about the substantive evils that the state has a right to prevent. In elaboration he added:

> "* * * If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower

[2] 268 U. S. 652, 45 Sup. Ct. 625 (1925), discussed in Anonymous, *Free Speech and Criminal Anarchy*, 9 CONST. REV. 239; and notes in 14 CAL. L. REV. 54; 25 COL. L. REV. 966; 41 HARV. L. REV. 525; 20 ILL. L. REV. 399, 808; 24 MICH. L. REV. 187; 4 NEB. L. BUL. 166; 5 OR. L. REV. 324; 4 U. CIN. L. REV. 211; and 35 YALE L. J. 108. On the case in the state court, see 36 HARV. L. REV. 199, 219, reprinted in 10 MASS. L. Q. (No. 3) 54; and 32 YALE L. J. 178.

> sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." [3]

With this, Mr. Justice Brandeis agreed. For the rest of the Court, Mr. Justice Sanford rejected the present-danger test and insisted that it is not the test of the constitutional power of government but the test whether utterances may be punished under a statute not specifically referring to utterances. This must now be taken as established, even though it seems quite clear that Mr. Justice Holmes had earlier in an opinion for a unanimous court announced the present-danger test as a criterion of constitutionality and not merely of statutory construction. Mr. Justice Sanford seems to waver between the two positions that the words of Mr. Gitlow were necessarily dangerous and that the state may punish them whether dangerous or not, when he says:

> "By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. * * *[4] That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A

[3] 268 U. S. 652, 673, 45 Sup. Ct. at 632.
[4] *Ibid.* 668, 45 Sup. Ct. at 631.

> single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when * * * it seeks to extinguish the spark without waiting until it has enkindled the flame * * *[5]
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> "* * * In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." [6]

In ruling on the refusal of the trial court to charge as requested by the defendant, Mr. Justice Sanford declares that it is not necessary that there be advocacy of some definite or immediate acts of violence or unlawfulness, or that the language should be reasonably calculated to incite certain persons to acts of violence, or that the advocacy be addressed to specific persons. It is enough if it is generally hortatory. Among the remarks of the manifesto were the following:

> "* * * 'Revolutionary Socialism does not propose to "capture" the bourgeois parliamentary state, but to conquer and destroy it[7] * * * It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action.* * * * The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.* * * *[8] It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. * * * The proletarian revolution and the Communist reconstruction of society—*the struggle for these* —is now indispensable.' * * *" [9]

The method suggested was chiefly the mass strike. With appar-

[5] *Ibid.* 669, 45 Sup. Ct. at 631.
[6] *Ibid.* 670, 45 Sup. Ct. at 631.
[7] *Ibid.* 658 in margin, 45 Sup. Ct. at 627.
[8] *Ibid.* 659 in margin, 45 Sup. Ct. at 627.
[9] *Ibid.* 660 in margin, 45 Sup. Ct. at 627.

ent approval, Mr. Justice Sanford quotes from one of the opinions of the New York Court of Appeals as follows:

> "* * * 'As we read this manifesto . . . we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism' and 'in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. * * * Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described.' "[10]

To this, Mr. Justice Sanford himself adds:

> "The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear." [11]

On the general power of the state to punish utterances Mr. Justice Sanford observed:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States. * * *
>
> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punish-

[10] *Ibid.* 663, 45 Sup. Ct. at 629.
[11] *Ibid.* 665-666, 45 Sup. Ct. at 629.

ment of those who abuse this freedom. . . . Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . . Thus it was held by this Court in the *Fox Case,* that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case,* that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. . . . It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. . . . And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. . . . In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. * * *" [12]

The California Criminal Syndicalism Act defined criminal syndicalism as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of ac-

[12] *Ibid.* 666-668, 45 Sup. Ct. at 630.

complishing a change in industrial ownership or control, or affecting any political change." It prescribed punishment for any one who organizes or assists in organizing or becomes a member of any society organized or assembled to teach such doctrine. This statute was held constitutional by a unanimous Court in *Whitney* v. *California*.[13] Mr. Justice Brandeis wrote a separate concurring opinion in which Mr. Justice Holmes joined. This refrained from technical dissent, because Miss Whitney had not duly raised in the state court the objection that there was no present danger of substantive evil and because there was evidence that tended to establish the existence of a conspiracy to commit present serious crimes and that such conspiracy would be furthered by the activity of the Communist Labor Party of which Miss Whitney was a member. Mr. Justice Brandeis declares that it has been settled "that the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent," and cites the *Schenck* case;[14] but this apparent set-

[13] 274 U. S. 357, 47 Sup. Ct. 641 (1927), considered in 41 HARV. L. REV. 199, 219; 22 ILL. L. REV. 541; 76 U. PA. L. REV. 198; and 14 VA. L. REV. 49, 63. On state statutes punishing criminal syndicalism, see notes in 10 CAL. L. REV. 512 and 32 YALE L. J. 295.

The California Criminal Syndicalism Act was sustained also in Burns v. United States, 274 U. S. 328, 47 Sup. Ct. 650 (1927), which affirmed a conviction under an Act of Congress making offenses in the Yosemite National Park subject to the same punishment as the California laws prescribe for a like offense. As the case came from the Federal District Court, it brought with it alleged errors in the admission of evidence and in the charge of the trial court. According to the dissenting opinion of Mr. Justice Brandeis, "the charge was clearly erroneous" in that "it plainly directed the jury that 'slowing down on the job' and 'scamped work' constituted sabotage within the meaning of the statute." For the majority, Mr. Justice Butler conceded that this portion of the charge might be thought erroneously to expand the meaning of sabotage beyond the definition of the statute, but he insisted that it had reference to an illustration of misloading a ship which, besides causing extra labor and expense, would also endanger the ship and therefore constitute *sabotage* within the meaning of the statute. He held further that the charge was not properly excepted to and that the possibly erroneous part was cured by other parts. Mr. Justice Brandeis failed to find the curative features of the rest of the charge and thought that prior exceptions to the introduction of evidence made clear the basis of the exception to the part of the charge complained of.

[14] Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919).

tlement in the *Schenck* case had already been unsettled as a constitutional test in the *Gitlow* case. That the majority of the Court still adhere to the rejection of the present-danger test is to be inferred from the statement of Mr. Justice Brandeis that he is "unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." In the opinion of the Court, Mr. Justice Sanford, after re-affirming that freedom of speech is not absolute and that great weight must be given to the declaration of the state legislature that membership in the proscribed organizations constitutes a menace to the state, continues:

> "The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. . . . That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State." [15]

Just how far the Court means to go in sustaining the Act "as here applied" is not clear. The opinion points out that rulings of the trial court on pleadings and evidence are not open for review. It insists that the contention that due process was denied in predicating guilt upon actions of the organization subsequent to the defendant's adherence to it is really not a constitutional objection to the Act but an improper effort to secure a review of the weight of the evidence. To this, however, it adds that Miss Whitney remained a member after defeat of a moderate resolution which she proposed, and it implies that the conviction would have been sustained even if objections to evidence were properly

[15] 274 U. S. 357, 371-372, 47 Sup. Ct. at 647.

in issue. The declarations of the "Platform and Program" of the organization are not set forth in full in the opinion, and the excerpts given are devoid of the pyrotechnic quality of much of the other speech that the Court has found too free. They stated, however, that the party was "in full harmony with 'the revolutionary working class parties of all countries' and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was 'to create a unified revolutionary working class movement in America', organizing the workers as a class, in a revolutionary class struggle to conquer the capitalistic state." [16] There was a reference to mass strikes and a recommendation that "propagandists and organizers be mobilized 'who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism'." [17]

Two other objections to the statute were held to be also unfounded. Without explicit analysis, Mr. Justice Sanford declared that the statute is not void because too vague and that "as applied here" it "required of the defendant no 'prophetic' understanding of its meaning." The objection that equal protection was denied because the statutes proscribed methods of changing industrial and political conditions and did not forbid similar methods of maintaining present conditions was dismissed on the ground that the legislature may deal with apprehended evils without covering all possible evils.[18]

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[16] *Ibid.* 363, 47 Sup. Ct. at 644.

[17] *Ibid.* 364, 47 Sup. Ct. at 644.

[18] For discussions of freedom of speech and of the press, see Forrest R. Black, *The Vanishing Bill of Rights,* 61 AM. L. REV. 227; Rome G. Brown, *Some Points on the Law of the Press,* 95 CENT. L. J. 59; Richard H. Eliel, *Freedom of Speech—During and Since the Civil War,* 18 AM. POL. SCI. REV. 713; Sidney S. Grant and S. E. Angoff, *Massachusetts and Censorship,* 10 BOST. L. REV. 36, 147; Walter J. Mattison, *Restraints on the Freedom of the Press,* 13 MARQ. L. REV. 1; Tully Nettleton, *The Philosophy of Justice Holmes on Freedom of Speech,* 3 S. W. SOC. & POL. Q. 287; Abraham Pinsky, *Freedom of Speech Under Our Constitutions,* 31 W. VA. L. Q. 230; James N. Rosenberg, *Censorship in the United States,* 32 LAW NOTES 49, 67; Robert H. Wettach, *Restrictions on a Free Press,* 4 N. C. L. REV. 24; and Hugh Evander Willis, *Freedom of Speech and of the Press,* 4 IND. L. J. 445. An interpretation of the New York obscenity statute is considered in John Ford, *Judicial Repeal of Legislative Action,* 3 ST. JOHNS L. REV. 216. Various regulations of newspapers are dealt with in notes in 24 COL.

The Criminal Syndicalism Act of Kansas proscribed promulgation of the doctrine "which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit." Undoubtedly such a statute is constitutional under the decisions just outlined. In *Fiske* v. *Kansas*,[19] however, a unanimous Court held that the application of the statute to the acts of the defendant deprived him of rights of free speech secured by the Fourteenth Amendment. The information charged advocacy of the doctrine of criminal syndicalism and specified the offense to have consisted in securing members in a Workers' Industrial Union which was a branch of the Industrial Workers of the World, the defendant "knowing that said organization unlawfully teaches, advocates and affirmatively suggests:

> " 'That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life.' And that, 'between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth, and the machinery of production and abolish the wage system.' And that: 'Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." By organizing industrially we are forming the structure of the new society within the shell of the old'." [20]

The only evidence offered as to the doctrines advocated by the defendant was this copy of the preamble of the constitution of the organization which had been set forth in the information.

L. REV. 793, on compelling newspapers to print public notices; in 27 COL. L. REV. 321 and 75 U. PA. L. REV. 377, on forbidding publication of betting news; and in 14 MINN. L. REV. 787, 811, on power of state to enjoin publication of newspaper as a public nuisance. Motion picture censorship is discussed in 1 TEMP. L. Q. 173 and 32 YALE L. J. 185. For references to articles and notes on freedom of speech in war time, see 19 MICH. L. REV. 289, n. 18; 295, n. 20; 297, n. 21; 20 MICH. L. REV. 401, n. 27; 402, n. 28; and 21 MICH. L. REV. 444, n. 18.

[19] 274 U. S. 380, 47 Sup. Ct. 655 (1927), considered in notes in 41 HARV. L. REV. 525 and 76 U. PA. L. REV. 198.

[20] 274 U. S. 380, 382-383, 47 Sup. Ct. at 655.

The defendant seasonably set forth the unconstitutionality of applying the statute to his acts. The state court held that it was open to the jury to find that this preamble had the sinister meaning attributed to it by the state. On writ of error the Supreme Court through Mr. Justice Sanford declared that this finding of fact was open to review in order to determine whether the statute had been unconstitutionally applied. In reversing the conviction, Mr. Justice Sanford said:

"Here the state court held the Syndicalism Act not to be repugnant to the due process clause as applied in a case in which the information in effect charged the defendant with violation of the Act in that he had secured members in an organization which taught, advocated and affirmatively suggested the doctrines set forth in the extracts from the preamble to its constitution, and in which there was no evidence that the organization, taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety, or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. There is no suggestion in the preamble that the industrial organization of workers as a class for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, 'the sinister meaning attributed to it by the state.' In this respect the language of the preamble is essentially different from that of the manifesto involved in *Gitlow* v. *New York,* 268 U. S. 652, 665, and lacks the essential elements which brought that document under the condemnation of the law. And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods. * * *

"The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he

> secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." [21]

This language seems to imply that the result would have been the same had the evidence been insufficient to warrant conviction of advocacy of unlawful methods even though the indictment or information adequately charged acts not constitutionally immune from punishment. Thus the Supreme Court will examine the record in the state court to see if the acts proven are acts that the state may constitutionally punish. Where it finds the evidence clear and undisputed, it will substitute its inferences of fact and law for those of the state court and jury. Under recognized canons, however, the Supreme Court will not weigh disputed evidence. Mr. Justice Sanford's reference to the absence of other evidence that this preamble was intended to be taken as advocacy of unlawful methods is an indication that Mr. Fiske would not have been saved if there had been testimony that he or his fellow members used moderate speech to convey immoderate promptings. The necessary limits of appellate review prevent this decision from being a bulwark for freedom of speech. Prosecuting attorneys may find easy ways of circumventing it and juries may wander far from wisdom without being subject to reversal by the Supreme Court of the United States.[22]

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[21] *Ibid.* 386-387, 47 Sup. Ct. at 657.

[22] Various topics related to legislative regulation of personal conduct are discussed in Abraham L. Freedman, *Imprisonment for Debt*, 2 TEMP. L. Q. 330; Bernard Ginsberg, *The New Poor Debtor Law*, 8 BOST. L. REV. 23; J. P. Chamberlain, *Legislatures and the Pistol Problem*, 11 AM. B. A. J. 596; *Anti-Fence Legislation*, 14 AM. B. A. J. 517; Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138; Walter Harrison Hitchler, *The Legal Crusades of the Sabbitarians*, 32 DICK. L. REV. 129; Leon Goodman, *Blue Laws, New and Old*, 12 VA. L. REG. [N. S.] 663; William F. Keefer, *Has a Person a Constitutional Right to Abstain from Work?*, 29 W. VA. L. Q. 20; David E. Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694; Daniel J. McKenna, *Witchcraft—An Obsolete Crime*, 13 MARQ. L. REV. 18; and notes in 10 VA. L. REV. 158, on forbidding angry exhibition of weapon; in 34 LAW NOTES 61, on anti-cigarette legislation; in 33 LAW NOTES 203; 23

A New York statute declaring that certain membership corporations and associations requiring an oath as a condition of membership must file with the secretary of state a sworn copy of their constitution and by-laws, regulations and oath of membership, and lists of officers and members was sustained in *Bryant* v. *Zimmerman* [23] in affirming a denial of a writ of habeas corpus to a member of the Ku Klux Klan in custody on a charge of belonging to the organization knowing that it had failed to comply with the registration statute. The contention that the statute abridged the privileges and immunities of the relator as a citizen of the United States was answered by saying that "if to be and remain a member of a secret, oath-bound association within a State be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the Constitution is in no wise affected by its possessor being a citizen of the United States." [24] The complaint under the due process clause was rejected by declaring the regulation a reasonable one tending to "operate as an

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MICH. L. REV. 759; 8 NEB. L. BUL. 174; and 12 ST. LOUIS L. REV. 123, on various Sunday laws; in 2 DAK. L. REV. 493; 5 N. C. L. REV. 75; 6 N. C. L. REV. 300; and 15 ST. LOUIS L. REV. 96, on worthless-check acts as imposing imprisonment for debt; in 2 SO. CAL. L. REV. 483, on jurisdiction over crimes committed in the air; in 39 HARV. L. REV. 492, 508, on crimes consummated outside the state; in 10 MINN. L. REV. 435 and 35 YALE L. J. 878, on power to punish obtaining money by false pretences through telegram sent from outside the state; in 26 COL. L. REV. 70, on territorial element in state criminal jurisdiction; in 29 COL. L. REV. 637, on compelling private persons to aid in the enforcement of the criminal law; in 43 HARV. L. REV. 121, on compelling testimony of absent witnesses; in 10 VA. L. REV. 243, on case holding that taking a drink may be punished as possession of liquor; in 12 MINN. L. REV. 74, on prohibiting solicitation of personal-injury claims; in 38 HARV. L. REV. 684, on forbidding the killing of deer though same necessary to save property; and in 37 HARV. L. REV. 1121, 1135, on the crime of conspiracy.

[23] 278 U. S. 63, 49 Sup. Ct. 61 (1928), discussed in 13 MARQ. L. REV. 242; 27 MICH. L. REV. 562; 6 N. Y. U. L. REV. 318; 4 NOTRE DAME LAW. 392; 8 OR. L. REV. 279, 295; and 3 ST. JOHNS L. REV. 262. The case in the lower court is the subject of comment in 14 CORN. L. Q. 218; 10 MINN. L. REV. 60; and 35 YALE L. J. 230. On similar legislation, see Anonymous, *Kansas Ku Klux Ouster Stands,* 13 AM. B. A. J. 200. The right of assembly is considered in editorial notes in 42 HARV. L. REV. 265 and 76 U. PA. L. REV. 609, and in Laurence A. Stith, *Offense of Unlawful Assembly as a Limitation on the Right to Assemble,* 32 LAW NOTES 187.

[24] 278 U. S. 63, 71-72, 49 Sup. Ct. at 64.

effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required." [25] Power to require the disclosure from the association carries with it power to punish members who participate with full knowledge that the statute has not been complied with. More attention was devoted by Mr. Justice Van Devanter to the complaint of a denial of equal protection of the laws by the exemption of other oath-bound membership organizations subject to another statute providing for their incorporation and requiring a list of officers but not of members. Among such were labor organizations, Masons, Odd Fellows, G. A. R., and Knights of Columbus. Mr. Justice Van Devanter referred to a number of decisions and opinions marking the distinction between classifications that are arbitrary and those that are reasonable, quoted opinions from the courts below on differences between the Ku Klux Klan and these other organizations which were not required to reveal the names of their members, recited conclusions of a Congressional Committee as to the practices and ideals of the Ku Klux Klan, and concluded that "the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed." [26] The exemption of associations having less than twenty members was also condoned. A dissenting opinion by Mr. Justice McReynolds was confined to the objections that the federal question was not properly raised in the state court and that the court should not entertain jurisdiction on proceedings begun by habeas corpus in the state courts in advance of trial.[27]

A statute of Nebraska which forbade the teaching of any sub-

[25] *Ibid.* 72, 49 Sup. Ct. at 65.

[26] *Ibid.* 77, 49 Sup. Ct. at 66.

[27] An Act of Congress for the District of Columbia which forbade the operation of a motor vehicle by one whose license was revoked or suspended was applied in District of Columbia v. Freed, 281 U. S. 49, 50 Sup. Ct. 163 (1930), to a resident of the District who had operated his car there under a new license which he had obtained from the State of Virginia. Apparently the only question considered was one of statutory interpretation.

In 5 BOST. L. REV. 50 is a note on a statute suspending license to drive pending determination of complaint charging driving while intoxicated. In 1 ALA. L. REV. 230 is a discussion of power to punish one for leaving an accident without giving his name.

ject in any foreign language and the teaching of any language other than English to pupils before they had passed the eighth grade was declared unconstitutional in *Meyer* v. *Nebraska*[28] in so far as it was sought to be applied to a private school. It was assumed that the statute was constitutional in its application to public schools. The case reversed the conviction of a teacher who taught German as a language to a pupil below the eighth grade in a parochial school. Interference with the calling of the teacher was one of the grounds of objection. Interference "with the opportunities of pupils to acquire knowledge" and "with the power of parents to control the education of their own" was also adduced. Mr. Justice McReynolds observed that the Fourteenth Amendment protects not only freedom from personal restraint, "but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[29] The state court had sustained the statute as one promoting the end of having all citizens do their thinking in English. It had said that the interference with the individual pupil and his parents was slight because there was so much time outside of school hours when parents were free to control their children's education. Mr. Justice McReynolds answered that "practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto," that "mere knowledge of the German language cannot reasonably be regarded as harmful,"[30] and that in time of peace there is no adequate reason for the restriction in question. The fact that the statute applied only to a few subjects shows that its purpose was not to protect the

[28] 262 U. S. 390, 43 Sup. Ct. 625 (1923), discussed in Carl Zollman, *Parental Rights and the Fourteenth Amendment*, 8 MARQ. L. REV. 53; and notes in 17 AM. J. INT. LAW 507; 12 CAL. L. REV. 136; 12 GEORGETOWN L. J. 123; 37 HARV. L. REV. 151; 6 ILL. L. Q. 86; 18 ILL. L. REV. 394; 9 IOWA L. REV. 123, 138; 22 MICH. L. REV. 248; 8 MINN. L. REV. 61; 3 OR. L. REV. 71; 9 ST. LOUIS L. REV. 68; 72 U. PA. L. REV. 46; 9 VA. L. REG. [N. S.] 378; and 33 YALE L. J. 215.

[29] 262 U. S. 390, 399, 43 Sup. Ct. at 626.

[30] *Ibid.* 400, 43 Sup. Ct. at 627.

child's health by limiting his mental activities. "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child." [31] The opinion referred to customs among the Spartans and to suggestions by Plato for his Ideal Commonwealth whereby children were removed from parental control and subjected to a regimen imposed and supervised by public authorities; but Plato and the Spartans were reminded by Mr. Justice McReynolds that "although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." [32] Justices Holmes and Sutherland dissented in an opinion filed in the companion case involving an Iowa statute.

This Iowa statute declared unconstitutional in *Bartels* v. *Iowa* [33] did not differ materially from the Nebraska statute. The Iowa case involved the conviction of a teacher who taught young pupils to read German in a private school. An Ohio statute annulled in the same opinion confined its prohibition to the teaching of German to pupils below the eighth grade. There was no dissent from the adjudication that this special selection of a single language is unconstitutional. But as to the general restriction against teaching foreign languages to the young, Mr. Justice Holmes, for himself and Mr. Justice Sutherland, declared:

> "We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Four-

[31] *Ibid.* 403, 43 Sup. Ct. at 628.

[32] *Ibid.* 402, 43 Sup. Ct. at 628.

[33] 262 U. S. 404, 43 Sup. Ct. 628 (1923). This case is considered in a number of the discussions listed in note 28 *supra*, and more particularly in 37 HARV. L. REV. 151 and 9 IOWA L. REV. 123, 138. In 25 MICH. L. REV. 906 is a discussion of Farrington v. Tokushige, 273 U. S. 284, 47 Sup. Ct. 406 (1927), which enjoined the enforcement of drastic regulation of foreign-language schools in Hawaii.

teenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is 'whether, considering the end in view, the statute passes the bounds of reason, and assumes the character of a mere arbitrary fiat'. . . . I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried." [34]

These foreign language cases were the chief reliance of Mr. Justice McReynolds in *Pierce* v. *Society of Sisters of Holy Names* [35] which declared unconstitutional an Oregon statute

[34] 262 U. S. 404, 412, 43 Sup. Ct. at 630.

[35] 268 U. S. 510, 45 Sup. Ct. 571 (1925), discussed in 13 CAL. L. REV. 515; 98 CENT. L. J. 219; 25 COL. L. REV. 968; 20 ILL. L. REV. 378; 10 MARQ. L. REV. 94; 24 MICH. L. REV. 301; 9 MINN. L. REV. 69; 10 MINN. L. REV. 63; 4 TENN. L. REV. 216; 4 TEX. L. REV. 93; 74 U. PA. L. REV. 77; 11 VA. L. REG. [N. S.] 320; and 12 VA. L. REV. 146, 157. The case in the court below is treated in notes in 7 BL-MON. L. REV. 217; 12 CAL. L. REV. 509; 97 CENT. L. J. 201; and 22 MICH. L. REV. 838. The constitutional issue is considered in Anonymous, *The Oregon Compulsory School Law,* 8 CONST. REV. 241; Pierre Crabités, *Islaam and the Oregon Public School Law,* 12 AM. B. A. J. 753; and Clifford E. McDonald, *Compulsory Public School Attendance,* 7 MARQ. L. REV. 96.

Other compulsory school laws are the subject of comment in Edward Bearnam, *The Present Status of the Kansas System of Compulsory Education,* 23 ILL. L. REV. 30; and notes in 15 IOWA L. REV. 495 and 15 ST. LOUIS L. REV. 94. The requirement of a license for private schools in New York is treated in 7 MINN. L. REV. 346.

Direct or indirect control of matters related to religion is considered in B. H. Hartogenesis, *Denial of Equal Rights to Religious Minorities and Non-*

which, with certain exceptions, required parents and guardians to send every child between the ages of eight and sixteen to a public school within the district in which the child resides. The proceedings were brought by two educational corporations to enjoin the threatened injury to their business, but there were allegations of the rights of parents and children and these appear to be the underlying considerations invoked by Mr. Justice McReynolds when he says:

> "* * * we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [36]

The well settled rule that it does not deny the equal protection of the laws to have separate schools for white and colored chil-

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Believers in the United States, 39 YALE L. J. 659; William Bruce Hoff, *Religious Freedom under Our Constitutions,* 31 W. VA. L. Q. 192; George C. Lay, *The Growth of Religious Liberty,* 61 AM. L. REV. 345; Blewett Lee, *Establishment of Religion,* 14 VA. L. REV. 100; Clarence E. Martin, *The American Judiciary and Religious Liberty,* 13 VA. L. REG. [N. S.] 641, reprinted in 62 AM. L. REV. 658; Benjamin G. Reeder, *A Monograph on Religious Freedom,* 31 W. VA. L. Q. 192; Herbert A. Smith, *Church and State in North America,* 35 YALE L. J. 461; Harold M. Stephens, *The School, the Church, and the State,* 12 MARQ. L. REV. 206; W. B. Swaney, *Religious Freedom,* 12 VA. L. REV. 632; and notes in 23 COL. L. REV. 597, on regulation of religious bodies, giving them right to elect their pastors, and in 9 VA. L. REV. 61, on a case holding that spiritualism is not a part of religious liberty.

[36] 268 U. S. 510, 534-535, 45 Sup. Ct. at 573.

For references to discussions of the Tennessee anti-evolution law applicable to state-aided schools, see *supra,* page 34, note 17. On Bible reading in public schools, see articles and notes listed on page 33 *supra,* note 14. In the same note are references to discussions of legislative or administrative control of the conduct of pupils in public educational institutions.

dren was said by Mr. Chief Justice Taft in *Gong Lum* v. *Rice*[37] to be a sufficient justification for the exclusion of a Chinese child from a public school maintained for white pupils where there was a school for colored children in the neighborhood. After referring to the precedents, the Chief Justice concluded:

> "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." [38]

The duty of a husband and father to support his wife and family was the underlying basis for the statute of New York authorizing the seizure of the property of an absconding husband which was sustained and applied in *Corn Exchange Bank* v. *Coler*.[39] Under the interpretation of the statute by the New York court the owner of the property seized in his absence without notice to him could later contest the facts upon which the

[37] 275 U. S. 78, 48 Sup. Ct. 91 (1927), discussed in 16 CAL. L. REV. 346; 3 NOTRE DAME LAW. 150; 2 ST. JOHNS L. REV. 215; 13 ST. LOUIS L. REV. 156; and 37 YALE L. J. 518. For other discussions of the problem, see Hoke F. Henderson, *Separation of Races in Schools,* 32 LAW NOTES 147; and a note in 2 IND. L. J. 493, on race segregation in public schools.

Discrimination against negroes or aliens is considered also in Marshall F. Kizer, *Discrimination Against Persons Because of Race or Color,* 5 NOTRE DAME LAW. 322; Charles M. Kneier, *Discrimination Against Aliens by Municipal Ordinances,* 16 GEORGETOWN L. J. 143; Dorothy Schaffter, *The Iowa "Civil Rights Act,"* 14 IOWA L. REV. 63; and notes in 11 GEORGETOWN L. J. (No. 4) 70, on construction of Kansas Civil Rights Act; in 8 N. C. L. REV. 455 and 39 YALE L. J. 1207, on requiring equal accommodations on bus lines; in 22 ILL. L. REV. 667 and 11 MINN. L. REV. 463, on racial discrimination in theatres; in 36 YALE L. J. 853, on regulating intermarriage between whites and negroes; in 23 COL. L. REV. 388, on legislation affecting rights of aliens; in 24 MICH. L. REV. 300 and 12 VA. L. REV. 157, on denying aliens the right to fish; in 19 ILL. L. REV. 287; 21 MICH. L. REV. 461; and 34 YALE L. J. 325, on prohibiting firearms to aliens; and in 24 COL. L. REV. 426, on discrimination against aliens in licenses to sell soft drinks.

[38] 275 U. S. 78, 87, 48 Sup. Ct. at 94.

[39] 280 U. S. 218, 50 Sup. Ct. 94 (1930), discussed in 30 COL. L. REV. 257; 15 CORN. L. Q. 620; and 4 ST. JOHNS L. REV. 293. The case below is considered in 29 COL. L. REV. 669 and 28 MICH. L. REV. 75.

seizure was predicated, so that relief could be had against the operation of the statute by those who could prove that it should not have been applied to them.[40]

An objection that it was a denial of due process for a health board to order the exclusion of an unvaccinated child from both a public and a private school was deemed in *Zucht* v. *King*[41] to be so completely demolished by prior decisions that the writ of error from the state court was dismissed. This applied as well to the contention that it was unconstitutional to delegate to the board the power of deciding when such exclusion was necessary. The ordinance was said by Mr. Justice Brandeis to confer "not arbitrary power, but only that broad discretion required for the protection of the public health." A complaint that the board had by discrimination against the particular child denied her the equal protection of the laws was said not to go to the validity of

[40] Miscellaneous matters relating to the relations between spouses or the care of the state for the young and the old and the insane are treated in Joseph P. Chamberlain, *Changes in Community Property Laws,* 9 AM. B. A. J. 771; *Further Statutory Changes in the Legal Status of Women,* 11 AM. B. A. J. 317; Carrol R. Heft, *Women's Equality Legislation in Wisconsin,* 2 WIS. L. REV. 350; Jennie McMullin Turner, *Women's Rights by Blanket Legislation,* 2 WIS. L. REV. 103; Joseph P. Chamberlain and Sterling Pierson, *Old Age Pension Legislation,* 10 AM. B. A. J. 109; Charles E. Kemper, *The Lunacy Laws of Virginia; Are They Constitutional?,* 8 VA. L. REG. [N. S.] 573; George Rossman, *Parens Patriae,* 4 OR. L. REV. 233; and notes in 26 COL. L. REV. 94, on paternity proceedings in New York; in 28 COL. L. REV. 950, on insanity laws of New York; in 10 MINN. L. REV. 163, on enjoining communication with wife of plaintiff; in 43 HARV. L. REV. 832, on constitutionality of statute making entry of final decree of divorce mandatory on motion of guilty party; in 78 U. PA. L. REV. 109 and 33 W. VA. L. Q. 207, on extra-territorial effect of statute prohibiting re-marriage; in 32 YALE L. J. 825, on extent of a parent's duty to support; in 36 HARV. L. REV. 96, on the Missouri illegitimacy act; in 73 U. PA. L. REV. 316, on the Pennsylvania Old Age Assistance Law; in 37 HARV. L. REV. 151 and 10 VA. L. REV. 157, on unconstitutionality of placing under guardianship one physically but not mentally incompetent; in 27 COL. L. REV. 968, on rights of juveniles to constitutional guarantees in delinquency proceedings; in 2 WIS. L. REV. 161, on unconstitutionality of committing child to institution because of inability of parents to support, without consent of or notice to parents; and in 24 ILL. L. REV. 485 and 41 HARV. L. REV. 255, on punishing husband for non-support though not in jurisdiction where indicted.

[41] 260 U. S. 174, 43 Sup. Ct. 24 (1922), discussed in 1 TEX. L. REV. 345. Other cases on vaccination are considered in 22 MICH. L. REV. 277 and 8 MINN. L. REV. 453.

the ordinance or of the authority of the officials and therefore not to be one cognizable on writ of error but only on certiorari.[42]

A Virginia statute authorizing the sterilization of mental defectives confined in state hospitals by methods involving no serious pain or substantial danger to health was sustained in *Buck* v. *Bell* [43] in the case of a feeble-minded female who had a

[42] Legislation relating to bodily condition and activity is discussed in Geoffrey May, *Experiments in the Legal Control of Sex Expression,* 39 YALE L. J. 219; J. P. Chamberlain, *Eugenics and Limitations of Marriage,* 9 AM. B. A. J. 429; *Eugenics in Legislatures and Courts,* 15 AM. B. A. J. 165; James A. Tobey, *Public Health and the United States Supreme Court,* 11 AM. B. A. J. 707; *Public Health and the Police Power,* 4 N. Y. U. L. REV. 126; and a note in 38 YALE L. J. 684, on power to order a blood test.

Issues involving responsibility for crime are considered in Dwight G. McCarty, *Mental Defectives and the Criminal* Law, 14 IOWA L. REV. 401; Albert K. Stebbins, *Legal Responsibility for Criminal Acts,* 76 U. PA. L. REV. 704; and Francis Bowes Sayre, *Criminal Attempts,* 41 HARV. L. REV. 821.

[43] 274 U. S. 200, 47 Sup. Ct. 584 (1927), discussed in Jacob Broches Aronoff, *The Constitutionality of Asexualization in the United States,* 1 ST. JOHNS L. REV. 146; John A. Ryan, *Unprotected Natural Rights,* 11 CONST. REV. 223; and notes in 2 ALA. L. REV. 258; 8 BOST. L. REV. 50; 17 CAL. L. REV. 270; 27 COL. L. REV. 873; 23 ILL. L. REV. 185; 31 LAW NOTES 101; 1 LINCOLN L. REV. (No. 1) 3; 12 MARQ. L. REV. 73; 25 MICH. L. REV. 908; 12 ST. LOUIS L. REV. 299; 1 SO. CAL. L. REV. 73; 6 TENN. L. REV. 136; 2 U. CIN. L. REV. 103; and 13 VA. L. REG. [N. S.] 370. For consideration of the case below or of the constitutional issue involved, see Otis H. Castle, *The Law and Human Sterilization,* 53 REP. AM. BAR ASS'N 556; J. H. Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication,* 23 ILL. L. REV. 463, reprinted in 63 AM. L. REV. 48; Clarence J. Rudy, *Compulsory Sterilization; An Unwarranted Extension of the Powers of Government,* 3 NOTRE DAME LAW. 1; Burke Shartel, *Sterilization of Mental Defectives,* 16 J. CRIM. LAW 537; Burke Shartel, *Sterilization of Mental Defectives,* 24 MICH. L. REV. 1, reprinted in 59 AM. L. REV. 841; Laurence A. Stith, *Sterilization of the Unfit,* 32 LAW NOTES 108; Aubrey E. Shrode, *Sterilization of Defectives,* 11 VA. L. REV. 296; and notes in 26 COL. L. REV. 356, reprinted in 60 AM. L. REV. 273; 11 CORN. L. Q. 74; 39 HARV. L. REV. 770; 2 IND. L. J. 259; 11 IOWA L. REV. 262, 279; 15 IOWA L. REV. 238; 24 MICH. L. REV. 500; 10 MINN. L. REV. 343; 14 ST. LOUIS L. REV. 327; 12 VA. L. REV. 419, 426; and 11 VA. L. REG. [N. S.] 691. For law review discussions prior to 1922, see Charles E. George, *Sterilization of Criminals, Idiots, and Insane,* 75 CENT. L. J. 91; J. Miller Kenyon, *Sterilization of the Unfit,* 1 VA. L. REV. 91; W. A. S., *Sterilization of Criminals,* 22 LAW NOTES 65; and notes in 26 HARV. L. REV. 163, 175; 27 HARV. L. REV. 484; 15 LAW NOTES 47; 17 LAW NOTES 181; 18 LAW NOTES 83; 20 LAW NOTES 143; 13 MICH. L. REV. 160; 2 MINN. L. REV. 540; 1 VA. L. REV. 414; and 28 YALE L. J. 189.

feeble-minded mother and a feeble-minded illegitimate child. The procedure provided by the statute gave ample protection against hasty or incorrect determination of the facts of mental defectiveness, and was not contested as inadequate under the due process clause. The complaint of denial of equal protection because the law applied only to those in public institutions was declared to be without merit. In answer to the substantive complaint Mr. Justice Holmes observed:

> "* * * In view of the general declarations of the legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tube." [44]

To this he added: "Three generations of imbeciles are enough." Mr. Justice Butler dissents.

Calm as may be the judicial recitals of these issues of personal liberty, the conflicts are ones that stir men's souls. In three of the cases the matter was of grave moment to the most important single religious organization in the country and the only religious organization of international significance in the Christian world. Unanimously the Court sustained regulation of the Ku Klux Klan,[45] and unanimously it annulled the abolition of parochial and other private schools.[46] From the decision that imbeciles have no constitutional right to retain physical power to procreate,[47] Mr. Justice Butler dissented. One wishes

[44] 274 U. S. 200, 207, 47 Sup. Ct. at 585.
[45] Bryant v. Zimmerman, *supra* note 23.
[46] Pierce v. Society of Sisters of Holy Names, *supra* note 35.
[47] Buck v. Bell, *supra* note 43.

that he might have come forward with his reasons. The religious reasons that animate objectors to such legislation are set forth in some of the notes and articles evoked by the decision. To such objections, three generations of imbeciles are not too many if, to curtail the succession, we run counter to tenets that transcend matters of this mortal world. Such is the stuff with which the Supreme Court must deal, however little the deeper considerations touched by the legislation are brought to the surface in the opinions.

Other fires burn beneath the contentions raised by legislation that sends to prison men and women who belong to groups that seek a new economic order in the present world.[48] Prophecy must not be put with such passion as to partake of the quality of incitement. A cautious literary reserve is an essential of constitutionally-protected propaganda for far-reaching changes in the social order. After the decisions and opinions here reviewed, there should be increased scope for the activities of so-called public-relations counsel who are skilled in preparing copy for the press. Manifestoes should be drafted with the legal care that antedates the issue of municipal bonds. Much as we may appreciate the judicial criteria that tell us when words are too wild, it still remains open to wonder whether after all Mr. Fiske was so much more meritorious than Miss Whitney and Mr. Gitlow. We may wonder, too, whether the present-danger test which the minority sought to establish is one that could be applied with anything approaching factual accuracy by an appellate court.

Judicial government dictated by judicial views of policy finds perhaps its clearest expression in the cases preventing the states from suppressing private schools [49] or from restricting their use of foreign languages.[50] Those who put their trust in labels are likely to brand the views of the court in these cases as liberal. The efforts at regimentation involved in the offending statutes are of a nature which at one season it was fashionable to call Prussian. Yet it may be questioned whether in the long run it would not be better to suffer the legislatures to have their wilful

[48] Gitlow v. New York, *supra* note 2; Whitney v. California, *supra* note 13; Fiske v. Kansas, *supra* note 19.

[49] Pierce v. Society of Sisters of Holy Names, *supra* note 35.

[50] Meyer v. Nebraska, *supra* note 28; Bartels v. Iowa, *supra* note 33.

way rather than to seek relief in the contrary and more enlightened wilfulness of a court. Those who sincerely believe that questions of policy are for the legislature or for the electorate should protest as much when the court annuls a law which they abhor as when it vetoes one they much approve. Men who rejoice in decisions which annul statutes on no other basis than the judicial ideal of desirable social policy have but one escape from approval of the system of judicial review under which courts may have their way. This escape is open only to those whose joy derives from a forlorn recognition that the system has come to stay and a mitigating consolation when the ways of the court are ways that please.

The divisions of opinion in these cases on personal conduct occasion no surprise, though it is of interest that Mr. Justice Stone did not join with Justices Holmes and Brandeis in the separate opinion in the *Whitney* case.[51] He did not join in their dissent in the *Gitlow* case.[52] So far as appears, he concurred with the majority, though he was not a member of the Court when the case was argued. He was with the majority in holding that a lady who would not bear arms for her country cannot become a citizen under the existing federal statutes.[53] So it seems that thus far at least [53a] Mr. Justice Stone is like the former Mr.

[51] Whitney v. California, *supra* note 13.

[52] Gitlow v. New York, *supra* note 2.

[53] United States v. Schwimmer, 279 U. S. 644, 49 Sup. Ct. 448 (1929), considered in Ernst Freund, *United States* v. *Schwimmer*, 7 N. Y. U. L. REV. 157; Henry B. Hazard, *Supreme Court Holds Madam Schwimmer, Pacifist, Ineligible to Naturalization*, 23 AM. J. INT. LAW. 626; *"Attachment to the Principles of the Constitution" as Judicially Construed in Certain Naturalization Cases in the United States*, 23 AM. J. INT. LAW. 783; and notes in 9 BOST. L. REV. 262; 18 GEORGETOWN L. J. 273; 5 IND. L. J. 521; 28 MICH. L. REV. 444; 3 So. CAL. L. REV. 224; 3 U. CIN. L. REV. 462; and 16 VA. L. REV. 169.

[53a] This was in type before the decision was handed down in the Mackintosh Case, in which Mr. Justice Stone joined with Mr. Chief Justice Hughes and Justices Holmes and Brandeis in dissenting from a decision excluding from the privilege of naturalization an applicant who reserved the right of personal judgment upon bearing arms in war. Despite distinctions which may be drawn between the attitude of Miss Schwimmer and that of Mr. Mackintosh, and despite the possibility that Mr. Justice Stone might have felt Mr. Macintosh entitled to citizenship had his case arisen prior to that of Miss Schwimmer, it may be contended that there is enough inconsistency between voting to exclude one pacifistic person and voting to admit another,

Justice Clarke in breaking with Justices Holmes and Brandeis on issues of freedom of speech and association, though otherwise they are usually found in the same camp. It was very likely for quite divergent reasons that Mr. Justice Holmes and Mr. Justice Sutherland joined in dissenting against the annulment of the statutes restricting the use of foreign languages in elementary private schools.[54] The reasons for Mr. Justice Butler's solitary dissent in the case sustaining compulsory sterilization of imbeciles [55] are hardly to be referred to a general attitude that could be called liberalism, if we may judge from his usual place in the divided court.

That general attitudes determine concrete positions is to be inferred not only from the repetitions of the same alignment in case after case where the technical issues are quite different, but from the overtones and undertones in the opinions of the several Justices. While Justices Holmes and Brandeis concurred in the judgment in the *Whitney* case because they thought the application of the statute not properly raised, the opinion of Mr. Justice Brandeis is one that could have been written only by him or by Mr. Justice Holmes. This opinion may flatter the Fathers, or many of them; but it does not flatter colleagues who would not subscribe to its civilized theme. After saying that "to reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence," Mr. Justice Brandeis continues:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the

so that Mr. Justice Stone's refusal to join his prior associates may be taken to indicate a change of viewpoint.

Similarly in the case declaring unconstitutional the so-called Minnesota Gag Law, Mr. Justice Stone was with the majority and against Justices Van Devanter, McReynolds, Sutherland and Butler, with whom he was in agreement in the Whitney Case and presumably in the Gitlow Case.

[54] Meyer v. Nebraska, *supra* note 28; Bartels v. Iowa, *supra* note 33.

[55] Buck v. Bell, *supra* note 43.

secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." [56]

* * * * *

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it." [57]

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[56] 274 U. S. 357, 375-376, 47 Sup. Ct. at 648.

[57] *Ibid.* 377, 47 Sup. Ct. at 648.

III. OCCUPATIONS AND PROFESSIONS

The cases to be considered in this section are those concerned with the regulation of personal callings in which personal fitness is deemed of importance. A few others involve legislation that may belong more appropriately under regulation of business enterprise, but which it has seemed convenient to include here. Cases that deal with vendors or that involve some economic considerations will be gathered together in a later section. With the exception of the cases on teachers of foreign languages, already considered in the previous section, and the cases which involve price-fixing and the restriction of corporate conduct of drug stores, the court was unanimous. These cases and the decision on the Oregon School Law were the only ones in which statutes were declared unconstitutional. Thus it appears that the states are fairly careful to keep within constitutional bounds in imposing requirements of personal fitness for callings in which some degree of competence may be deemed essential.

A thirty-year-old statute of Washington requiring dentists to obtain a license from an administrative board was unsuccessfully attacked in *Douglas* v. *Noble*[58] for its failure to fix the standard which the administrative board should apply in passing upon the qualifications of applicants. Mr. Justice Brandeis recognized that if the statute did in fact confer arbitrary power upon the licensing board it would violate the Fourteenth Amendment, but he found that the state court had held that the power conferred was not arbitrary and he declared that it is not essential that the statute itself specify the subjects for examination, the mode of testing skill and knowledge, or the degree of proficiency that should be made the passing point. The discretion here vested in the licensing board was found to be no broader than that previously sustained. There was no proof of any habitual exercise of arbitrary power on the part of the board so as to bring the case within the principle that actual exercise of properly proved arbitrariness will entitle an applicant to relief.

One of the requirements for the dental license held constitutionally denied in *Graves* v. *Minnesota*[59] was that the applicant

[58] 261 U. S. 165, 43 Sup. Ct. 303 (1923).
[59] 272 U. S. 425, 47 Sup. Ct. 122 (1926).

must have graduated from some dental school found by the examining board to be one of good standing. This was approved by Mr. Justice Sanford as a reasonable requirement. Apparently there was no contention that the board had acted wrongly in passing upon the quality of dental schools. The case is decided upon the assumption that one convicted of practicing without a license may defend by calling in question the constitutionality of the grounds upon which the license was denied, though this issue is not mentioned.[60]

Exclusion of a licensed osteopath from a public hospital used also as an adjunct of the medical school of the state university was sustained in *Hayman* v. *Galveston*[61] as a regulation of the state's own enterprise. A provision in the state constitution forbidding preferences to any school of medicine was said to be confined to the determination of qualifications entitling one to practice and to have no relation to participation in the work of a public hospital.

An effort to enjoin the enforcement of a Tennessee statute requiring licenses for real estate brokers was unsuccessfully predicated in *Bratton* v. *Chandler*[62] upon a provision authorizing the commission "to *require* and *procure*" all satisfactory proof of applicant's qualifications. The district court had assumed that this authorized the commission to procure evidence without the

[60] On regulation of qualifications for entrance into medical or allied professions, see Louis G. Caldwell, *Early Legislation Regulating the Pratice of Medicine,* 18 ILL. L. REV. 245; and notes in 13 VA. L. REV. 495, on allowing commission to pass on medical schools; in 71 U. PA. L. REV. 185, on pre-requisite of graduation from Class A medical school; in 7 MINN. L. REV. 170, on delegation of power to medical licensing board; in 10 ST. LOUIS L. REV. 197, on practicing medicine without authority; in 1 TEMP. L. Q. 156, on requiring chiropractor to qualify in materia medica and surgery; and in 6 ILL. L. Q. 328, on denying to osteopath the right to an examination in surgery unless he has studied in a regular medical school.

[61] 273 U. S. 414, 47 Sup. Ct. 363 (1927), reviewed in more detail in 17 VA. L. REV. 659-660 [*supra,* pages 35-36].

[62] 260 U. S. 110, 43 Sup. Ct. 43 (1922), considered in Nathan William MacChesney, *Legal Regulation of the Personnel of Business,* 58 AM. L. REV. 1. The licensing of real-estate brokers is discussed in notes in 25 COL. L. REV. 220; 15 KY. L. J. 55; and 15 ST. LOUIS L. REV. 193. The requirement of moral fitness as a requisite of the grant of a realtor's license is considered in 10 MINN. L. REV. 547. In 24 COL. L. REV. 916 is a note on a case holding it unconstitutional to make the findings of fact of a licensing board final in denying a license to a realtor.

knowledge of the applicant and without giving him an opportunity to meet it, but Mr. Justice McKenna thought that this assumption neglected the judicial duty to construe a statute, if possible, so as to avoid doubts as to its unconstitutionality. Therefore he construed it as not going further than to confer the power of "affirmative direction upon the Commission, necessarily to be exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence." Thus construed, he added, the Act gives to the board all the power that it needs, "and will leave no power with it than it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States." The qualifications as to which proof was to be obtained included honesty, truthfulness, reputation and competency. Apparently the issue in the Supreme Court was confined to the method to be used in ascertaining them.[63]

The procedure unsuccessfully questioned in *Hurwitz* v. *North*[64] was that authorized for revocation of the licenses of

[63] Various issues arising in connection with occupational licenses are considered in notes in 26 COL. L. REV. 472, on regulation of useful occupations; in 43 HARV. L. REV. 302, on delegation of discretion in Massachusetts licensing statutes; in 21 ILL. L. REV. 269 and 14 ST. LOUIS L. REV. 79, on licenses for public accountants; in 2 ALA. L. REV. 192, on license for barbers; in 9 MARQ. L. REV. 117, on case holding that a bobber is not a barber within the Wisconsin statute; in 4 WASH. L. REV. 139, on requirement of license for barbering school or college; in 3 NOTRE DAME LAW. 152, on power to refuse license to conduct an employment agency; in 17 ILL. L. REV. 330, on regulation of business of removing and hauling for hire; in 39 YALE L. J. 745, on regulation of agencies soliciting money for charitable purposes; in 2 TEMP. L. Q. 83, on license for stock-brokers; in 6 N. C. L. REV. 488, on Sunday sales; in 20 ILL. L. REV. 179 and 6 N. C. L. REV. 90, on prohibiting auctions at night; in 29 COL. L. REV. 1012, on requirement of bond as condition of becoming milk dealer; in 77 U. PA. L. REV. 295, on licensing of motion picture exhibition; and in 1 TEMP. L. Q. 173 and 32 YALE L. J. 185, on motion picture censorship.

[64] 271 U. S. 40, 46 Sup. Ct. 384 (1926), discussed in 21 ILL. L. REV. 493. On the case in the court below, see 38 HARV. L. REV. 253. On revocation of licenses, see Roger R. Tuttrup, *Necessity of Notice and Hearing in Revocation of Occupational Licenses,* 13 VA. L. REG. [N. S.] 97, reprinted from a note in 4 WIS. L. REV. 180; and notes in 9 MINN. L. REV. 385, on necessity of notice and hearing; in 11 CAL. L. REV. 273, on invalidity of revocation of license of stockbroker because complaint did not specify wrong; in 37 HARV. L. REV. 919, on constitutional limitations on revocation of license of insurance agent; in 16 KY. L. J. 181, on case holding state board cannot revoke license of den-

physicians by the state board of health. There was notice and hearing and a right of review in the state court by certiorari, but the physician objected because he could not bring witnesses before the board by subpoena but was confined to the use of depositions from all witnesses on his behalf who would not voluntarily attend the hearing. The rule was the same for all testimony whether for or against the physician. Mr. Justice Stone observed that the Fourteenth Amendment is concerned with substance rather than form, and found that substantial interests were adequately protected by the procedure provided. The equal protection clause was satisfied because all physicians were treated alike.

The certification of public accountants involved in *Lehmann* v. *State Board of Public Accountancy* [65] was not compulsory. The case arose on a bill for an injunction brought by one who had received a certificate and who wished to restrain the board from proceeding to cancel it. He complained that the board had no rules and no standards to be applied in proceedings to cancel a certificate and that therefore it must of necessity exercise an arbitrary power. The Supreme Court affirmed the state court in sustaining the power of the board to revoke as well as to grant certificates. How much more the case decides is doubtful. Mr. Justice McKenna states that the Court cannot "assume that the Board will be impelled to action by other than a sense of duty or render judgment except upon convincing evidence introduced in a regular way with opportunity of rebuttal," and he declares that "we certainly cannot restrain the Board upon the possibility of contrary action." There is a possibility of inferring from other recitals in the opinion that the decision is influenced by the fact that the certificate was not a prerequisite to practicing as an accountant.

The conduct of a pool room is deemed in *Clarke* v. *Deckebach* [66] to be an occupation of such a character that the state may reasonably conclude that aliens should be excluded from it. Mr.

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tist because of conviction of misdemeanor of possessing liquor; and in 6 N. C. L. REV. 77, on administrative revocation of license of physician.

[65] 264 U. S. 394, 44 Sup. Ct. 128 (1923).

[66] 274 U. S. 392, 47 Sup. Ct. 630 (1927), discussed in 22 ILL. L. REV. 755; 1 So. CAL. L. REV. 94; and 14 VA. L. REV. 60. On forbidding aliens to sell soft drinks, see 4 BOST. L. REV. 204. For other comments on discrimination against aliens, see references in note 37, *supra*.

Justice Stone observed that "the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens," but he said no more on the assumed superiorities of citizen-conducted pool rooms than that "the ordinance in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment." [67]

Whether pawnbroking can similarly be confined to citizens so far as the equal protection clause is concerned is a question left undecided in *Asakura* v. *Seattle*,[68] since it was held to be "trade" within the meaning of a Treaty with Japan which thereby protected the alien from the state statute complained of. In the preceding case involving the pool room there was also a treaty which referred to "trade and commerce." The pool room business was held plainly not commerce. A comparison of the opinions in the two cases suggests the possibility that the difference of decision is dictated not wholly by the language of the respective treaties but in some part by a conception of differences in the two occupations which makes discrimination against aliens more justifiable in one case than in the other.

An attorney who, on pain of disbarment, was ordered by a state court to refund a fee received by him in workmen's compensation proceedings contended unsuccessfully in *Yeiser* v. *Dysart*[69] that his liberty of contract was unconstitutionally interfered with by the statute which confined his remuneration to what the court should award. Mr. Justice Holmes adduced a case sanctioning the limitation of attorney's fees in prosecuting claims against the government and said:

> "* * * When we add the considerations that an attorney practises under a license from the State and that the subject matter is a right created by statute, it is obvious that the State may attach such conditions to the license in respect of

[67] In 29 W. VA. L. Q. 140 is a note on delegation to administrative commission of power to license pool rooms; in 33 W. VA. L. Q. 116, a consideration of power of city to license or forbid pool rooms.

[68] 265 U. S. 332, 44 Sup. Ct. 515 (1924).

[69] 267 U. S. 540, 45 Sup. Ct. 399 (1925), discussed in 9 MINN. L. REV. 674 and 4 NEB. L. BUL. 357. On control over admission to bar, see notes in 8 BOST. L. REV. 203; 13 CAL. L. REV. 271; and 76 U. PA. L. REV. 740; on the right of attorneys to practice in other jurisdictions, see 2 TEMP. L. Q. 260; on the right of a disbarred attorney to appear in person as plaintiff in suit on claim assigned to him, see 13 CAL. L. REV. 323.

such matters as it believes to be necessary in order to make it a public good. * * *" [70]

By thus combining the nature of the proceeding and the nature of the profession, the opinion leaves us in doubt what weight would be attached to the single consideration of some peculiar power confined to members of the bar.

Suppression of the calling of a teacher of foreign languages in private elementary schools was held a denial of the constitutional liberty of the teacher in *Meyer* v. *Nebraska* [71] over the dissent of Justices Holmes and Sutherland. The case arose through a conviction of a teacher, but the rights of parents and children were adduced also as grounds of the decision, and these seem to be the really determining elements in the case. The statute also forbade the teaching of subjects in any other language than English and this was not restricted to pupils below the eighth grade. This part of the statute did not receive explicit consideration in Mr. Justice McReynolds's opinion, but there was no caveat with respect to it.

One of the statutes involved in *Bartels* v. *Iowa,* [72] decided at the same time, confined its proscription to teaching of the German language in elementary schools. As to this there was no dissent. In both cases it was assumed that the statute is constitutionally applicable to public schools. The reason given for the dissent in both cases to the major restriction against teaching foreign languages to children in the schools was that the regulation might under some circumstances be regarded as a reasonable means of attaining the end of ensuring that all citizens speak a common tongue.

Under the authority of the two preceding cases, *Pierce* v. *Society of Sisters of Holy Names* [73] held unconstitutional an Oregon statute requiring children of specified ages to attend public schools in the district in which they reside. The proceedings were brought by educational corporations to prevent injury to their business, but the decision was placed primarily upon interference with constitutional rights of parents and children to select other

[70] 267 U. S. 540, 541, 45 Sup. Ct. at 400.
[71] *Supra* note 28.
[72] *Supra* note 33.
[73] *Supra* note 35.

than public schools. Of the occupation of a teacher in a private educational institution Mr. Justice McReynolds spoke approvingly when he said: "These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious." [74]

The disputed issue in *Weller* v. *New York* [75] was whether the statutory requirement of a license for ticket brokers could be separated from the other provisions restricting the advance over the box-office price which might be charged by them. Mr. Justice McReynolds said that the Supreme Court should hold them separable, in advance of clear intimation to the contrary from the state court. In sustaining the conviction for selling without a license, he said that "it is not and, we think, it cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets." [76] The licensee was required to pay $100 a year and to put up a bond of $1000 conditioned on the undertaking that he would not be guilty of fraud or extortion; and there were provisions for revocation of the license. These requirements were conditioned also on maintaining the resale prices fixed by the statute. There was no consideration by the Supreme Court of the details of the requirements.

Later the Supreme Court by a vote of five to four in *Tyson & Bro.* v. *Banton* [77] held unconstitutional the restriction on the resale price. An effort to regulate the fees of employment agencies met the same fate in *Ribnik* v. *McBride,* [78] though here Mr. Justice Sanford joined with the majority because he thought the issue settled by the Ticket Broker Case. The persisting dissentients in the two cases were Justices Holmes, Brandeis and Stone. Later Mr. Justice Brandeis, in the course of sustaining price-fixing of the fees of commission agents in stock-yards, observed in *Tagg Brothers & Moorhead* v. *United States* [79] that the earlier cases do not mean that charges for personal services cannot be

[74] 268 U. S. 510, 534, 45 Sup. Ct. at 573.

[75] 268 U. S. 319, 45 Sup. Ct. 556 1925). The case in the state court is the subject of comment in 97 CENT. L. J. 202.

[76] 268 U. S. 319, 325, 45 Sup. Ct. at 557.

[77] 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[78] 277 U. S. 350, 48 Sup. Ct. 545 (1928).

[79] 280 U. S. 420, 50 Sup. Ct. 220 (1930).

regulated. He added that the Court had divided rather on the issue whether the businesses involved were then affected with a public interest. During the present October 1930 Term, with Mr. Chief Justice Hughes and Mr. Justice Roberts in the seats of Mr. Chief Justice Taft and Mr. Justice Sanford, the Court has sustained regulation of the commissions of insurance agencies,[80] but with dissent from Justices Van Devanter, McReynolds, Sutherland and Butler. These cases on price-fixing have been grouped for more detailed exposition elsewhere.[81] While some of them involve services rather than sales or use of property, the considerations underlying them have more in common with cases under the topics of trade and finance than with those put primarily under the head of professions and occupations.

More appropriately under the regulation of trade belong *Roschen* v. *Wood*[82] holding it constitutional to require a duly licensed physician or optometrist to be in attendance at any established place at which spectacles are sold for the correction of vision, and *Liggett Co.* v. *Baldridge*[83] holding it unconstitutional to forbid partnerships or corporations to conduct drug stores unless all their partners or stockholders are licensed pharmacists.

The regulation involved in *Herbring* v. *Lee*[84] was one directed at insurance companies, requiring them to pay $500 for every authorized agent in excess of one for each town or city, with provision for additional agents without charge for cities having a population of fifty thousand or more—one additional agent for each additional fifty thousand of population. A would-be agent who was denied a license because his company would not

[80] O'Gorman and Young v. Hartford Fire Insurance Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

[81] Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930,* 29 MICH L. REV. 811, 822-838.

[82] 279 U. S. 337, 49 Sup. Ct. 336 (1929). A case on refusing to a department store a license to practice optometry is treated in a note in 9 BOST. L. REV. 272.

[83] 278 U. S. 105, 49 Sup. Ct. 57 (1928).

[84] 280 U. S. 111, 50 Sup. Ct. 49 (1929). Limitation of the number of agents of insurance companies is discussed in notes in 38 HARV. L. REV. 257 and 73 U. PA. L. REV. 203. On restriction of insurance agents to residents and denial of a license to a domestic corporation owned largely by a foreign corporation, see 41 HARV. L. REV. 918.

pay the $500 fee contended unsuccessfully that this was an unconstitutional regulation of his occupation. Mr. Justice Sanford answered that he had no constitutional right to represent an insurance company unless the insurance company had a right to appoint him, and that he cannot complain solely on the ground of the possible indirect effect of the statute on him, when the rights of the company are not duly brought in issue. So far as appeared, the company made no complaint, and no rights of the company were adequately adduced in the proceedings brought on behalf of Mr. Herbring.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—IV [1]

IV FOOD, DRINK AND DRUGS

THE few cases in this section might readily be allocated to other sections dealing with physical conditions or with trade. The advantages of an independent grouping are perhaps not so apparent when but few cases are gathered together as when we are making a survey of the work of the court for a longer period. Legislation dealing with products that may be swallowed by mankind bulks big enough in the books to have a place by itself, and the judicial attitude toward such legislation is on the whole one of greater tolerance than that displayed toward some other restrictions on manufacturers and dealers. For this latter statement we cannot adduce as supporting evidence the first case to be here considered, but this may very likely be due to the fact that we are surveying a period in which judicial tolerance toward legislation was not in its most flourishing state.

The Nebraska Standard-weight Bread Law which prescribed maximum weights for loaves of various sizes in order to prevent loaves of one size from masquerading as loaves of a larger size was declared unconstitutional in *Burns Baking Co.* v. *Bryan*[2] over the dissent of Justices Brandeis and Holmes. The statute prescribed that the average weight of twenty-five loaves should not within twenty-four hours after baking fall below the nom-

[1] For the preceding instalments, see 17 VA. L. REV. 529-556, 653-675, 765-799.

[2] 264 U. S. 504, 44 Sup. Ct. 412 (1924), discussed in notes in 97 CENT. L. J. 309; 12 GEORGETOWN L. J. 243; 19 ILL. L. REV. 261; 23 MICH. L. REV. 60; 3 NEB. L. B. 277; 3 TEX. L. REV. 447; 10 VA. L. REG. (N. S.) 284; and 33 YALE L. J. 847.

inal weight or exceed it by more than two ounces to the pound. Mr. Justice Butler for the majority accepted as true the evidence offered by the bakers to show that at some seasons in Nebraska bread that is not wrapped will vary more than two ounces per pound from the time of baking until the end of the twenty-four hour period. From this he concludes that during those seasons "the enforcement of the provision necessarily will have the effect of prohibiting the sale of unwrapped loaves when evaporation exceeds the tolerance." This must be because the bread when baked must not exceed the tolerance since it may be weighed at that time. If evaporation within twenty-four hours reduces the weight more than two ounces per pound, the bread then violates the statute because it weighs less than the prescribed minimum. Mr. Justice Brandeis does not discuss this particular evidence, but he cites various reports to show that bakers elsewhere have found no difficulty in complying with even more stringent laws and that tests conducted in the District of Columbia by the Bureau of Standards show shrinkage there to be less than one ounce per pound. Such reports may be inapposite unless we know the relative moisture in Nebraska and Washington. Both opinions leave the outsider with no certainty as to bread evaporation in Nebraska, which is the vital issue upon which the case turns. Mr. Justice Butler apparently finds it in some fashion objectionable to test the weight by the average of twenty-five loaves, for he remarks that "undoubtedly, very few private consumers purchase at one time as many as twenty-five loaves of the same standard size or unit" and "it is admitted that the sale of a lesser number not within the permitted tolerance does not constitute an offense." Where this is admitted does not appear. A further recital, apparently by way of criticism, is that the inspector may select any twenty-five loaves to make his test and "therefore, if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven, or fall below the minimum weight within twenty-four hours, it will always be possible to make up lots of twenty-five or more loaves whose average weight will be above or below the prescribed limits." Apparently the inspector is likely to be too sinister to trust the normal method of sampling, or perhaps

sampling seems unreliable to Mr. Justice Butler. To Mr. Justice Brandeis the test of the average of twenty-five loaves is less stringent than the test of each individual loaf adopted by several states. And to him it is enough, "even if it were true that varying evaporation made compliance with the law difficult", that "a sufficiently stable weight can, confessedly, be secured by the use of oil paper wrapping (now required in several States for sanitary reasons), which can be inexpensively supplied." Not so, to the majority, for Mr. Justice Butler says:

> "* * * The act is not a sanitary measure. * * * Admittedly, the provision in question is concerned with weights only. * * * The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. * * * It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. * * *"[8]

This does not tell us whether the right to furnish unwrapped bread is a constitutional right or only a right under existing Nebraska law. If the latter, there still seems open the possibility that wrapping might be required for sanitary reasons, and that then the excess weight limitation would be one easily complied with. Mr. Justice Butler, however, insists that the prescription of maximum weights is not necessary to prevent fraud and that it is unreasonable to assume that any one is deceived by excess weights. Mr. Justice Brandeis, however, cites legislation and official reports to the contrary, and concludes by a suggestion that the majority are actuated by considerations of policy in the exercise of a power not given to the judiciary:

> "To decide, as a fact, that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effectuate that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens, is, in my opinion, an ex-

[8] 264 U. S. 504, 516 (1924).

ercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review." [4]

The contention unsuccessfully urged against the New York statute regulating the sale of "kosher" meat was that the description of "kosher" was so indefinite that the statute contained no ascertainable standard of guilt. Without going into details Mr. Justice Sutherland declared in *Hygrade Provision Co.* v. *Sherman*[5] that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing", and that the exceptional cases were no worse than those arising under the Sherman Anti-Trust Law or the laws relating to intoxicating liquor and obscene literature. The law in the present case made it a misdemeanor for any one with intent to defraud to sell meat or meat products falsely represented as kosher "or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements." The fact that the vendor could escape prosecution by proving that he had no intent to defraud was adduced as an important added reason why the statute was sufficiently definite to stand. There was no contention in the case that the general aim of the regulation was beyond the scope of the police power, so that we have adjudication by consent that proper labelling may be enforced for other objects than ones exclusively relating to health or economic considerations.

A statute of Georgia making it unlawful for any person to

[4] *Ibid.*, 534.

For consideration of other legislation respecting foodstuffs, see Milton Conover, *National, State, and Local Co-operation in Food and Drug Control,* 22 AM. POL. SCI. REV. 910; Alvin C. Reis, *The Wisconsin Marketing Laws,* 9 MARQ. L. REV. 131; and notes in 29 COLUM. L. REV. 1012, on requirement of bond as condition of being a milk dealer; in 12 MINN. L. REV. 75, on unconstitutionality of statutory prohibition of manufacture of oleomargarine; in 6 N. Y. UNIV. L. REV. 493, on discrimination in requirement of pasteurization of milk; in 8 TEX. L. REV. 435, on municipal ordinance requiring inspection of baking products held unreasonable as applied to bakers outside city limits; and in 4 WASH. L. REV. 140, on regulation of butcher-shops. A case holding unconstitutional the prohibition of cigarette advertisements in Kansas is discussed in 31 LAW NOTES 161.

[5] 266 U. S. 497, 45 Sup. Ct. 141 (1925), discussed in 73 U. PA. L. REV 315. In this case, Mr. Justice Brandeis did not sit.

have in his possession any intoxicating liquors for beverage purposes, even though intended exclusively for personal use, was held in *Samuels* v. *McCurdy*[6] to be constitutionally applicable to liquor acquired prior to any apposite inhibition thereon. Mr. Justice Butler, in dissenting, insisted that prior cases had not gone so far as this; he pointed out that Georgia did not forbid private drinking; and he insisted that "any suggestion that the destruction of such private supply lawfully acquired and held for the use of the owner in his own home is necessary for or has any relation to the suppression of sales or to the protection of the public would be fanciful and without foundation." For the rest of the Court Mr. Chief Justice Taft observed that "it is obvious that if men are permitted to maintain liquor in their possession, though only for their own consumption, there is danger of its becoming accessible to others." He

[6] 267 U. S. 188, 45 Sup. Ct. 264 (1925), considered in Andrew A. Bruce, *The Private Stock of Liquor and the Inherent Right of Self-Destruction,* 20 ILL. L. REV. 757; and notes in 13 CALIF. L. REV. 516; 13 GEORGETOWN L. J. 295; 38 HARV. L. REV. 1119; 9 MINN. L. REV. 675; and 74 U. PA. L. REV. 190. On similar problems, see notes in 21 ILL. L. REV. 626 and 25 MICH. L. REV. 784, on power of state legislature to prohibit possession though state constitution does not prohibit it; in 28 COLUM. L. REV. 103, on giving drink by guest to host as "possession" by host; in 3 TEMP. L. Q. 324, on prohibiting possession of home brew; in 75 U. PA. L. REV. 187, on possession for non-beverage purposes; in 14 ST. LOUIS L. REV. 435, on permitting householders to make and have liquor; in 16 CALIF. L. REV. 534, on forbidding possession of any device designed for manufacture of intoxicating liquor; and in 2 WIS. L. REV. 164, on case holding state may forbid maintenance of standing bar even though no intoxicants are sold. Issues of statutory interpretation are dealt with in Ben Ely, Jr., *The Meaning of "Hootch, Moonshine, Corn Whiskey" in the Missouri Prohibition Law,* 39 LAW SERIES MISSOURI BULLETIN 5. For discussions of the legality of possession under federal statutes, see Wayne B. Wheeler, *Possession of Liquor under National Prohibition Act,* 95 CENT. L. J. 99; and notes in 11 MINN. L. REV. 166, and 9 VA. L. REV. 133. On concurrent power of state to punish possession, see 8 CORNELL L. Q. 149; on state case holding federal statute does not prohibit purchase, see 8 No. CAR. L. REV. 462; and on ordering delivery of liquor as conspiracy to transport under federal statute, see notes in 43 HARV. L. REV. 317; 77 U. PA. L. REV. 538; and 15 VA. L. REV. 689. Questions of what constitutes "transportation" of liquor are noted in 2 IND. L. J. 337; 5 No. CAR. L. REV. 145; 12 ST. LOUIS L. REV. 72 (from woodshed to dwelling); 5 TENN. L. REV. 103; and 13 VA. L. REV. 46, 55 (from shed to attic). The illegality of temporary control of liquor for the purpose of taking a drink is the subject of comment in 13 CALIF. L. REV. 330.

affirmed that "the state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom its use would demoralize and to avoid the abuses which follow in its train." Legislation making possession unlawful had previously been sustained, so that the only question open was whether the state should pay for liquor lawfully acquired before specific statutory warning that it was to become contraband. The Chief Justice pointed out that by valid regulations the property right in such liquor had become difficult to measure in value, that for years people had known that the commodity was in bad odor, and he inquired rhetorically: "Why should compensation be made now for the mere remnant of the original right if nothing was paid for the loss of the right to sell it, give it away or transport it?" Seizure of the liquor without judicial condemnation was held proper, since the owner might bring a bill to obtain possession and enjoin the destruction of any liquor held by him for the limited and non-beverage purposes allowed by the statute.[7]

[7] Various problems of the enforcement of national prohibition which may have counterparts raised by state enforcement laws are considered in Bruno V. Bitker, *Effect of the Padlock Law upon Landlord and Tenant,* 13 MARQ. L. REV. 200; Forrest R. Black, *The Expansion of Criminal Equity under Prohibition,* 5 WIS. L. REV. 412; Thomas F. Konop, *Proposed Legislation for Enforcement of Prohibition,* 5 NOTRE DAME LAW. 355; W. A. Shumaker, *Padlock Injunctions,* 30 LAW NOTES 185; George Cyrus Thorpe, *Intoxicating Liquor Laws,* 14 GEORGETOWN L. J. 315; Robert N. Golding, *Constitutional Questions Involved in the Abatement and Injunctional Sections of the National Prohibition Act,* 19 ILL. L. REV. 71; James Hart, *Some Constitutional Questions Growing out of the President's Executive Order for Prohibition Enforcement,* 13 VA. L. REV. 86; Frederick A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement,* 97 CENT. L. J. 113; Paul R. Kach, *Another Thought on Prohibition Enforcement,* 11 VA. L. REG. [N. S.] 655; Eusebio Chacon, *Abatement of Nuisances under the Volstead Act,* 11 A. B. A. JOUR. 663.

Injunctions and padlocks under state laws are the subject of notes in 9 BOST. UNIV. L. REV. 45; 12 IOWA L. REV. 306; 13 IOWA L. REV. 206, 219; 14 MASS. L. Q. (No. 1) 56; and 3 NOTRE DAME LAW. 281.

On similar issues under federal statutes, see notes in 40 HARV. L. REV. 786; 32 LAW NOTES 103; 3 NEB. L. BUL. 274; 71 U. PA. L. REV. 91; 72 U. PA. L. REV. 283, 289; 75 U. PA. L. REV. 375. Padlocking the property of innocent owners is considered in 25 COLUM. L. REV. 374 and 3 N. Y. L. REV. 177; liquor brought in by patrons as basis of injunction against nuisance, in 7

A statute declaring a vehicle used in the transportation of intoxicating liquor to be a common nuisance and authorizing its forfeiture by trial before a judge without a jury was held in *Van Oster* v. *Kansas*[8] to be constitutionally applicable to an automobile used by another with the consent of the owner although the owner was ignorant of the unlawful use and although the user was subsequently acquitted by a jury of the charge of unlawful transportation. Mr. Justice Stone reserves the case of vehicles appropriated and used by a lawbreaker without the owner's consent, which the statute apparently was broad enough to cover. The objection that jury trial was denied in the forfeiture proceeding was declared to be unsubstantial. The effect of the subsequent acquittal of the person whose alleged acts were the basis

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BOST. UNIV. L. REV. 315; 28 COLUM. L. REV. 247; and 76 U. PA. L. REV. 104; injunctions unrelated to acts at a specified place, in 30 COLUM. L. REV. 730 and 43 HARV. L. REV. 1159.

Constitutional restraints on searches and seizures raise disputes that may properly belong under the head of Police Power, but for purposes of convenience they will be presented under a separate rubric of Criminal Procedure and Punishment, to which the numerous references to law-review discussions will be appended.

[8] 272 U. S. 465, 47 Sup. Ct. 133 (1926), discussed in 26 MICH. L. REV. 104; 6 NEB. L. B. 314; and 4 N. Y. UNIV. L. REV. 84. On questions involving forfeiture of vehicles under national or state laws, see Forrest R. Black, *Some Prohibition Forfeiture Cases—The Doctrine of Vicarious Liability,* 78 U. PA. L. REV. 518; Frank Buckley, *Forfeiture of Vehicles for Unlawful Movement of Liquor,* 4 BOST. UNIV. L. REV. 183; Charles S. Desmond, *Forfeiture of Vessels in Enforcement of National Prohibition,* 11 A. B. A. JOUR. 21; C. W. Schutter, *Forfeiture of Vehicles and Conveyances under Section 26 of the National Prohibition Act,* 7 N. Y. UNIV. L. REV. 866; Nathan B. Williams, *Forfeiture Laws,* 16 A. B. A. JOUR. 572; and notes in 2 ALA. L. REV. 46, 4 ALA. L. REV. 50; 5 ALA. L. REV. 66; 12 CALIF. L. REV. 225; 20 COLUM. L. REV. 798; 22 COLUM. L. REV. 273; 7 CORNELL L. Q. 269; 13 CORNELL L. Q. 451; 34 HARV. L. REV. 200, 212; 39 HARV. L. REV. 265; 41 HARV. L. REV. 676; 23 ILL. L. REV. 287; 12 IOWA L. REV. 283, 306; 14 IOWA L. REV. 103; 19 MICH. L. REV. 350; 25 MICH. L. REV. 659; 10 MINN. L. REV. 546; 2 NO. CAR. L. REV. 126; 6 NO. CAR. L. REV. 193; 2 ROCKY MT. L. REV. 198; 77 U. PA. L. REV. 1031; 8 VA. L. REV. 59; 11 VA. L. REV. 575; 15 VA. L. REV. 54, 70; 16 VA. L. REV. 298; 10 VA. L. REG. [N. S.] 901; 33 W. VA. L. Q. 108; 1 WIS. L. REV. 117; 30 YALE L. J. 91; and 32 YALE L. J. 197.

Forfeiture of automobile acting as convoy is treated in 3 TEMP. L. Q. 216 and 15 VA. L. REV. 172. Rights of innocent owners of seized automobiles are discussed in 2 ALA. L. REV. 262; 12 IOWA L. REV. 283, 306; 12 MINN. L. REV. 298, 299; 1 TEX. L. REV. 113; 72 U. PA. L. REV. 181; 74 U. PA. L. REV. 170; 35 YALE L. J. 884.

of the forfeiture was said to involve only a question of state procedure.

A contention that the Volstead Act granted a right or privilege to regularly licensed pharmacists to fill prescriptions calling for more than eight ounces of intoxicating liquor and that this right is protected by the Fourteenth Amendment against a state law restricting prescriptions to eight ounces was held in *Hixson* v. *Oakes*[9] to be so unfounded that the writ of error from the state court was dismissed. Apparently Mr. Justice McReynolds confines the decision to the absence of any privilege protected by federal legislation and holds that the Fourteenth Amendment was not properly invoked in the court below.[10]

The Pennsylvania regulation of drug stores declared unconstitutional in *Liggett Co.* v. *Baldridge*[11] was apparently an effort to keep corporations from engaging in the business, because it imposed the almost impossible condition that all stockholders must be registered pharmacists. "Mere stock ownership in a corporation, owning and operating a drug store," said Mr. Justice Sutherland, "can have no real or substantial relation to the public health." Mr. Justice Holmes in dissent suggested that the legislature might reasonably think otherwise, and Mr. Justice Brandeis agreed with him.

This case and the case dealing with the Nebraska weight-of-bread law were the only two in this section in which statutes were

[9] 265 U. S. 254, 44 Sup. Ct. 514 (1924), discussed in 3 TEX. L. REV. 103.

[10] Various problems arising out of the relation of state to national power are treated in J. P. Chamberlain, *Harmonizing Federal and State Prohibition Standards,* 10 AM. B. A. JOUR. 311; J. P. Chamberlain, *Enforcement of the Volstead Act Through State Agencies,* 10 AM. B. A. JOUR. 391; Wayne B. Wheeler, *Use of State Agencies in Aid of Discharge of Federal Functions,* 99 CENT. L. J. 222; and notes in 17 CALIF. L. REV. 555 and 21 MICH. L. REV. 462, on state adoption of future amendments of Volstead Law; in 33 LAW NOTES 81, on duty of state to enforce 18th Amendment; in 10 MINN. L. REV. 342, on action in state court by federal attorney to enjoin liquor nuisance; in 36 YALE L. J. 260, on Volstead Act as basis for state prosecution for nuisance; in 32 YALE L. J. 512, on state action for damages for selling liquor founded on Volstead Act; in 33 YALE L. J. 636, on vesting state courts with enforcing power under Volstead Act; in 1 NO. CAR. L. REV. 60, on state enforcement of 18th Amendment; in 11 CALIF. L. REV. 369 and 8 MINN. L. REV. 64, on liquor as a subject of larceny; and in 8 VA. L. REV. 768, 777, on supremacy of Volstead Act in case of conflict with state statute.

[11] 278 U. S. 105, 49 Sup. Ct. 57 (1928).

held unconstitutional. Those whom the late Judge Hough once called the Bostonese Twins of Dissent were exemplifying their appellation in both these cases. The only other dissent was that of Mr. Justice Butler from the decision sustaining uncompensated confiscation of lawfully acquired liquor. The regulation of drug stores is an illustration of a class of legislation that may be thought to masquerade as a health measure when it is really animated by other motives. The Nebraska bread law was frankly economic. There is doubtless economic motive behind the anti-liquor legislation. Something more than considerations of health and religion may underlie the legislative protection of "kosher" meat. Certainly it is the economic conduct of unconscionable traders which creates the need for such legislation. Thus while legislation concerning food and drink may be assumed to be concerned mainly with health and morals, it would be a naïve person who would be blind to other considerations that may have animated the legislators and the voters whom they care to please.

V PHYSICAL CONDITIONS

The cases dealing with food and drink [12] and with vaccination [13] and vasectomy [14] might have been included here if they had not found an appropriate place elsewhere. The majority of the cases here considered have to do with natural resources and the incidents of their use. Some have to do with the quality of commodities. The object of physical requirements about physical things is often the promotion of physical health and physical safety, thus bringing legislation within what have long been deemed primary ends of the police power of the state. After legislation for such objects gains secure constitutional sanction, there may develop a tendency on the part of other legislation to masquerade in approved costumes as protective coloration against the scrutinizing eyes of the courts. It will not do to assume that laws are passed to ensure physical safety even though the courts

[12] *Supra,* pages 87-95.
[13] Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24 (1922), *supra,* pages 71-72.
[14] Buck v. Bell, 274 U. S. 200, 47 Sup. Ct. 584 (1927), *supra,* pages 72-73.

may choose to call them safety laws. In this section as in others, economic aims may find a haven which dare not write economics above its door.

A Pennsylvania statute forbidding the mining of anthracite coal in such a way as to cause a subsidence of any dwelling or other structure in which persons dwell or work, unless the coal extractor is owner of the surface, was held in *Pennsylvania Coal Co.* v. *Mahon*[15] to go beyond proper police power and amount to a taking which requires compensation under principles of eminent domain. For the majority Mr. Justice Holmes says that the statute is not necessary for safety, since that may be secured by notice of intended mining which threatens the surface. In dissenting Mr. Justice Brandeis urges that weight should be given to the judgment of the legislature which by passing the statute indicated that it thought that protection from such notice would not be adequate. He points out that if mining necessarily caused the spread of poisonous gases, there would be no doubt that the state might prohibit mining without buying the owner's coal fields, and inquires: "And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or so near the surface, as to expose the community to like dangers?" Mr. Justice Holmes answers that "the question at bottom is upon whom the loss should fall" and concludes that "so far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they paid for." Mr. Justice Brandeis counters by saying that the fact that the restraint might be secured through the exercise of eminent domain does not establish that it cannot be accomplished by the police power, as is evident from cases on limitation of height of buildings. A man may be forbidden to build so high as to hurt his neighbors, and the restriction might be imposed just the same if the estate in the air above a certain height had been sold to another. Why should the separation of surface

[15] 260 U. S. 393, 43 Sup. Ct. 158 (1922), discussed in 11 CALIF. L. REV. 188; 36 HARV. L. REV. 753; 21 MICH. L. REV. 581; 7 MINN. L. REV. 242; 1 N. Y. L. REV. 242; 71 U. PA. L. REV. 277; 9 VA. L. REV. 457; and 32 YALE L. J. 511. On the case in the state court, see 71 U. PA. L. REV. 77.

rights from underground rights bar the state's power? Mr. Justice Holmes justifies such restraints as building restrictions and compulsion of neighboring mines to leave boundary pillars to prevent either from flooding the other as ones which "secured an average reciprocity of advantage that has been recognized as a justification of various laws." Mr. Justice Brandeis says that such "average reciprocity" is not essential when the object of the police power is not to confer mutual benefits but to protect the public from detriment and danger. There was no reciprocal advantage to owners who suffered from suppression of oil tanks, brickyards, livery stables, billiard halls, oleomargarine and liquor, "unless it be the advantage of living and doing business in a civilized community"—which advantage is conferred on the coal operators by the Pennsylvania statute. To the point of Mr. Justice Holmes that the taking in this case is very great, since the only object in owning coal is to get it out and if you can't get it out you have lost all valuable interest in a valuable estate, Mr. Justice Brandeis answers that values are relative and that we should compare mining value with whole value or with surface value and that "for aught that appears the value of the coal kept in place may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place, and which may be extracted despite the statute." He says also that "the restriction here in question is merely the prohibition of a noxious use"; the property remains in the possession of the owner; "the state does not appropriate it or make any use of it." Against this Mr. Justice Holmes points out that diminution of values incident to property by purported exercise of police power has constitutional limits. "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts." With reference to the interests of the cities in the streets which might fall from mining, Mr. Justice Holmes says that such rights as it has acquired by eminent domain are those that it has paid for and adds that "if in any case its representatives have been so shortsighted

as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much." The deed to the surface owner in the case had expressly reserved the right to remove all the coal without any liability for any damages that might arise. Only in such cases would the statute have application, for it in terms excluded mining by one who owned both surface and subsurface. The whole constitutional issue comes down to one of judgment on an issue of degree as Mr. Justice Holmes points out when he says:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this court. * * *" [16]

Constitutional complaints against the order of a state commissioner of conservation refusing to issue a permit for the construction and operation of a plant to employ natural gas in the manufacture of carbon black were left unconsidered in *Herkness* v. *Irion* [17] because it appeared that the order was without statutory warrant and was subject to injunction on this ground. The statute regulated the use of natural gas and instructed the commissioner to reduce the authorized minimum allowed to be taken when such reduction was necessary to secure adequate supply of gas for domestic heating and lighting purposes.[18] The commis-

[16] 260 U. S. 393, 415-416 (1922).

[17] 278 U. S. 92, 49 Sup. Ct. 40 (1928).

[18] A statute of similar character was sustained in Walls v. Midland Car-

sioner did not purport to act under this authorization but had proceeded upon a personal notion that it would be well to deny permits for any new carbon-black plants notwithstanding the different type of restriction conceived by the legislature.[19]

In the course of holding that a municipality cannot invoke the contract clause or the Fourteenth Amendment against the state, Mr. Justice Butler declared in *Trenton* v. *New Jersey*[20] that "the state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants", that "the power to determine the conditions upon which waters" from lakes and running streams may be "diverted is a legislative function", and that "the state may grant or withhold the privilege, as it sees fit." The act in question imposed a limited restraint upon diversion by levying on cities or companies a tax of $1 per hundred million gallons diverted in excess

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bon Co., 254 U. S. 300, 41 Sup. Ct. 118 (1920), which is the subject of treatment in Thomas W. Shelton, *The Police Power Versus Property Rights,* 7 VA. L. REV. 455; and notes in 19 MICH. L. REV. 555; 5 MINN. L. REV. 386; and 27 W. VA. L. Q. 255.

[19] Legislative power over oil and gas is considered in Joseph P. Chamberlain, *Regulation of Oil and Gas,* 11 AM. B. A. J. 233; D. Edward Greer, *The Ownership of Petroleum Oil and Natural Gas in Place,* 29 W. VA. L. Q. 172; Maurice H. Merrill, *Stabilization of the Oil Industry and Due Process of Law,* 3 So. CALIF. L. REV. 396; James A. Veasey, *Legislative Control of the Business of Producing Oil and Gas,* 52 REP. AM. BAR ASS'N 577; Dwight Williams, *The Power of the State to Control the Use of Its Natural Resources,* 11 MINN. L. REV. 129, 233; and notes in 43 HARV. L. REV. 1137, on oil and gas conservation, and in 5 TEX. L. REV. 328, on regulation of drilling oil wells.

For discussions of conservation prior to 1922, see Andrew Alexander Bruce, *The Conservation of our National Resources and of our National Strength and Virility,* 58 U. PA. L. REV. 125; H. N. Eldridge, *Conservation of Natural Resources,* 13 LAW NOTES 87; Noel Sargent, *Conservation and the Police Power,* 12 ILL. L. REV. 162; John Stokes Adams, *The Right of a Landowner to Oil and Gas in His Land,* 63 U. PA. L. REV. 471; Philip T. Steptoe and George M. Hoffheimer, *Legislative Regulation of Natural Gas Supply in West Virginia,* 25 W. VA. L. Q. 257; and W. L. Summers, *Legal Interests in Oil and Gas,* 4 ILL. L. Q. 12, 167.

[20] 262 U. S. 182, 43 Sup. Ct. 534 (1923), which is the subject of notes in 37 HARV. L. REV. 159 and 18 ILL. L. REV. 477. This case is followed in Newark v. New Jersey, 262 U. S. 191, 43 Sup. Ct. 539 (1923), which denies to a city the right to object to a tax under the equal-protection clause. These two cases are considered *supra,* pages 18-20.

of a stated amount per capita of users where that amount was in excess of the diversion on the date of the act.[21]

A Virginia statute requiring the destruction of red cedar trees when necessary to prevent the spread of cedar rust destructive to apple trees was sustained by a unanimous court in *Miller* v. *Schoene*.[22] Discretion was vested in the state entomologist who was to conduct an investigation upon the request of ten or more reputable freeholders. Since power of decision was vested in a public official there was held to be no delegation of legislative authority to private persons. The complaint that the statute was vague was declared to be without weight since there was procedure by which the property owner could get complete judicial review of the order of the entomologist. After observing that the value of cedar trees in Virginia is small as compared with that of the apple orchards in which are invested "many millions of dollars" and "which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities", Mr. Justice Stone continues:

> "On the evidence we may accept the conclusion of the supreme court of appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in

[21] On public powers over waters, see Edward F. Treadwell, *Modernizing the Water Law*, 17 CALIF. L. REV. 1; Lucien Shaw, *The Development of the Law of Waters in the West*, 10 CALIF. L. REV. 443; Samuel C. Wiel, *Europeanizing the State Constitution—The Water and Power Amendment*, 12 CALIF. L. REV. 454; *The Pending Water Amendment to the California Constitution, and Possible Legislation*, 16 CALIF. L. REV. 169, 257; and *The Recent Attorneys' Conference on Water Legislation*, 17 CALIF. L. REV. 197; Dwight Williams, *The Power of the State to Control the Use of its Natural Resources*, 11 MINN. L. REV. 129, 133; and notes in 15 CALIF. L. REV. 229, on authorizing storage of water from river; in 40 HARV. L. REV. 1023, on legislative limitation of riparian rights; and in 14 VA. L. REV. 664, on earth removed by levee board during emergency. In 11 CALIF. L. REV. 197, is a discussion of a case holding that at common law a rice grower must not allow water to percolate so as to injure land of adjoining fruit grower.

[22] 276 U. S. 272, 48 Sup. Ct. 246 (1928), discussed in 12 MINN. L. REV. 655; 14 VA. L. REV. 585; and 5 WIS. L. REV. 116. For earlier comments on the Virginia statute, see notes in 7 BOST. U. L. REV. 125; 34 HARV. L. REV. 672; and 19 MICH. L. REV. 554. On broader control of trees, see Jeannie S. Peyton, *State Forestry Legislation, 1927-1928*, 23 AM. POL. SCI. REV. 116.

> dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. * * * And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." [23]

An ordinance requiring tanks containing more than specified amounts of petroleum products or other inflammable liquids to be buried at least three feet undergound was sustained in *Standard Oil Co.* v. *Marysville*[24] notwithstanding the findings of the master from which he inferred that it was more dangerous to store large quantities of gasoline underground than above ground. The dangers of storage above ground were sufficiently established by fires that had occurred in the state and Mr. Justice Stone observed that "we need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision." The complaint as to possibility of leakage and consequent fires and pollution of wells from tanks buried in the earth was answered by pointing out that the master had found that the conditions of the soil which might produce electrolysis and corrosion were not present in this part of Kansas, that the tanks would be below the level of the sewers, that

[23] 276 U. S. 272, 279-280 (1928).

[24] 279 U. S. 582, 49 Sup. Ct. 430 (1929). The case in the court below is discussed in 17 NAT. MUN. REV. 702 and 15 VA. L. REV. 70.

there were no wells near by, and that the soil had been tested and found impervious to gasoline. The dangers from fire were assumed to be less from tanks underground for the reason that the insurance rates on them were only fifty per cent of the rates on tanks above. The burden of burial was regarded as no greater than that of removing the tanks from the immediate vicinity of any dwelling, which had already been sustained.

The principle that companies running cars or trains along or across the public highways may be required at their own expense to make reasonable arrangements to guard against danger or to facilitate traffic found application in decisions compelling a street railroad to demolish a viaduct over steam railroad tracks and lay double tracks at grade,[25] compelling a railroad to put in an underpass and accept a plan involving an added cost of $100,000 in order to avoid some six per cent curves,[26] and compelling a carrier to maintain a flagman day and night at a street crossing notwithstanding its inauguration and maintenance of an electric signal warning which it contended without much dissent afforded more protection than a flagman.[27]

The duty of a street railroad to pave that part of the highway occupied by its tracks was sustained in one case where the road was losing money[28] and in another where a line of track worth only $100,000 was charged with $100,000 for paving, which was more than the amount charged against abutting property worth $5,000,000.[29]

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[25] New Orleans Public Service v. New Orleans, 281 U. S. 682, 50 Sup. Ct. 449 (1930). This case and the others involving imposition of duties on railroads are reviewed in more detail in Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930,* II, 29 MICH. L. REV. 1001, 1014-1019. Earlier in the same article are cases on the duty to continue service and to give adequate service and cases on prescriptions relating to facilities and use of property.

In 75 U. PA. L. REV. 671, is a note on alleged interference with vested rights by forbidding one-man trolley cars a few years after permitting them.

[26] Lehigh Valley R. Co. v. Board of Public Utility Commissioners, 278 U. S. 24, 49 Sup. Ct. 69 (1928).

[27] Nashville, C. & St. L. R. Co. v. White, 278 U. S. 456, 49 Sup. Ct. 189 (1929).

[28] Fort Smith L. & T. Co. v. Board of Improvement, 274 U. S. 387, 47 Sup. Ct. 595 (1927).

[29] Durham Public Service Co. v. Durham, 261 U. S. 149, 43 Sup. Ct. 290 (1923).

Various regulations of motor carriers, predicated in part at least upon proprietary power over the highways, have already been reviewed.[30] While motor carriers for hire in intrastate commerce may be subjected to the requirement of securing a certificate of convenience and necessity,[31] private carriers may not be denied a certificate as a means of compelling them to become public carriers.[32] The combined load of motor trucks may be limited to 16,500 pounds where there is nothing to show that the requirement is too drastic from the standpoint of the protection of the highways from deterioration.[33] Other regulations that condition the use of the highways on furnishing some form of security for compensation for injuries caused by motor vehicles seem to belong more directly under the head of regulation of liabilities than under the rubric of physical conditions.

Statutes which deal with rights to acquire or to use the land of another give rise to issues which seem to fall more appropriately under the head of Property Interests. Among such statutes are those which the states of the Pacific Coast have passed to keep the ownership or control of agricultural lands out of the hands of specified aliens who are thought to have more capacity as farmers than as voters and who are deemed more desirable as employees than as proprietors. These have been sustained against the complaints not only of aliens but also of citizen owners who professed to resent the restraints on alienation of which they were victims.[34] In deference to ancient com-

[30] *Supra,* Section 1, *Governmental and Proprietary Powers,* pages 36-43. In the footnotes on these pages are references to law-review articles and notes on regulation of motor vehicles and of other uses of the highways. To these should be added Sterling Pierson, *Recent Legislation Affecting Carriers by Motor,* 12 AM. B. A. J. 473; and notes in 14 CALIF. L. REV. 142, on validity of anti-speed-trap law; in 22 ILL. L. REV. 676, on powers of cities in Ohio to require bonds from taxicab operators; in 1 IND. L. J. 287, on regulation of lights on motor vehicles; in 15 IOWA L. REV. 379, on the Iowa Truck Operator Law; and in 43 HARV. L. REV. 958, on depriving abutting owner of right of access to property for filling station.

[31] Interstate Busses Corporation v. Holyoke Street Railway, 273 U. S. 45, 47 Sup. Ct. 298 (1927).

[32] Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925); Frost & Frost Trucking Co. v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605 (1926).

[33] Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548 (1927).

[34] Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15 (1923); Porterfield

munal custom in Pittsburg, the court sanctioned a party-wall statute under which an owner of a building that went to the limit of his line was subjected to the uncompensated annoyance of the exposure due to the destruction of his wall by a neighbor in the process of erecting a heavier party wall in its place.[35] On the other hand a railroad was successful in its protest against an ordinance which commanded it to afford space on its station grounds for parking of cars by those who were bent on soliciting incoming passengers to be their paying guests on the final lap of their journey over the city streets.[36]

While for many years the movement for a comprehensive zoning system has been gaining headway and been applied in many urban areas, the issue of constitutionality did not reach the Supreme Court until 1926. In *Euclid* v. *Ambler Realty Co.*[37] after a re-argument and over the dissent of Justices Van Devanter, McReynolds and Butler, the general features of such a plan were sustained. The case arose in an effort to enjoin the enforcement of *any* of the restrictions. The District Court had granted an injunction. In reversing this, the Supreme Court carefully reserves the question of the constitutionality of specific applications of the statute.[38] It makes clear, however, that

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v. Webb, 263 U. S. 225, 44 Sup. Ct. 21 (1923); Webb v. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112 (1923); Frick v. Webb, 263 U. S. 326, 44 Sup. Ct. 115 (1923); Cockrill v. California, 268 U. S. 258, 45 Sup. Ct. 490 (1925).

[35] Jackman v. Rosenbaum Co., 260 U. S. 22, 43 Sup. Ct. 9 (1922).

[36] Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 48 Sup. Ct. 277 (1928).

[37] 272 U. S. 365, 47 Sup. Ct. 114 (1926), discussed in Alfred Bettman, *The Decision of the Supreme Court of the United States in the Euclid Village Zoning Case,* 1 U. CIN. L. REV. 184; Thomas A. Byrne, *The Constitutionality of a General Zoning Ordinance,* 11 MARQ. L. REV. 189; George D. Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances,* 33 W. VA. L. Q. 332; and notes in 40 HARV. L. REV. 644; 2 IND. L. J. 557; 21 ILL. L. REV. 806; 12 IOWA L. REV. 301; 30 LAW NOTES 221; 25 MICH. L. REV. 907; 11 MINN. L. REV. 275; 5 NEB. L. BUL. 419; 5 NO. CAR. L. REV. 237; 2 NOTRE DAME LAW. 167; 1 ST. JOHNS L. REV. 79; 12 ST. LOUIS L. REV. 149; 5 TEX. L. REV. 307; 13 VA. L. REV. 321; and 36 YALE L. J. 427.

[38] For articles on zoning and related matters, published in 1927-1930, see William Anderson, *Zoning in Minnesota: Eminent Domain vs. Police Power,* 16 NAT. MUN. REV. 624; Robert C. Brown, *Anti-Social Exercise of Rights,* 4 TEMP. L. Q. 339; Joseph P. Chamberlain, *Zoning Progress,* 15 AM. B. A. J. 535; Ernst Freund, *Some Inadequately Discussed Problems of the Law*

it approves of a zoning plan whereby an area is reserved for residential purposes, and whereby restrictions are put on the use of other areas. Under the Euclid ordinance the higher-class uses were permitted in the lower-class zones. In the second class zone, the use was extended to two-family dwellings; in the third class, to apartment houses, hotels, churches, clubs, and buildings for various public uses; in the fourth class, to banks, offices, and higher-grade mercantile and amusement buildings; in the fifth class to lower-grade mercantile buildings and to warehouses and buildings for various designated manufacturing and industrial uses; and in the sixth class to substantially everything else.[39] The attitude of the court and the reasons underlying it are presented by Mr. Justice Sutherland as follows:

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of City Planning and Zoning, 24 ILL. L. REV. 135; Harold C. Havighurst, *Property Owners' Consent Provisions in Zoning Ordinances,* 36 W. VA. L. Q. 175; John W. Kephart, *A Story,* 33 DICK. L. REV. 108; Elmer M. Leesman, *Private Nuisances in Illinois,* 24 ILL. L. REV. 876; Charles P. Light, Jr., *Aesthetics in Zoning,* 14 MINN. L. REV. 109; Regis McGuirk, *An Outline of the Law of Nuisances in its Relation to Real Property,* 11 BI-MONTH. L. REV. 189; F. D. G. Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation,* 16 VA. L. REV. 689; James M. Rosenthal, *Massachusetts Cases on Zoning,* 10 BOST. U. L. REV. 319; M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds,* 37 YALE L. J. 407; Herman L. Weisman, *Zoning Administration in New York City,* 2 ST. JOHNS L. REV. 105; and Clifton Williams, *Some Legal Aspects of City Planning,* 12 MARQ. L. REV. 251.

[39] For articles on zoning published in 1922-1927, see Newman F. Baker, *Zoning Legislation,* 11 CORNELL L. Q. 164; *Zoning Ordinances,* 11 IOWA L. REV. 152; *Aesthetic Zoning Regulations,* 25 MICH. L. REV. 124; *Municipal Aesthetics and the Law,* 20 ILL. L. REV. 546; *The Constitutionality of Zoning Laws,* 20 ILL. L. REV. 213; *Zoning Held Constitutional in Illinois,* 15 NAT. MUN. REV. 145; and *The Zoning Board of Appeals,* 10 MINN. L. REV. 277; Edward M. Bassett, *Zoning,* 9 NAT. MUN. REV. 311; *New Court Decisions on Zoning,* 13 NAT. MUN. REV. 346; and *Constitutionality of Zoning in the Light of Recent Court Decisions,* 13 NAT. MUN. REV. 492; Charles A. Beard, *Some Aspects of Regional Planning,* 20 AM. POL. SCI. REV. 273; Alfred Bettman, *Constitutionality of Zoning,* 37 HARV. L. REV. 834; Francis P. Burns, *Police Power in Zoning,* 7 LOYOLA L. J. 16; J. P. Chamberlain and Sterling Pierson, *Further Comment on Zoning,* 10 AM. B. A. J. 245; J. P. Chamberlain, *A Legislative Attack on Slums,* 12 AM. B. A. J. 849; Henry P. Chandler, *The Attitude of the Law Toward Beauty,* 8 AM. B. A. J. 470; Wilmot R. Evans, *Conveyancing under Zoning Laws,* 12 MASS. L. Q. [No. 6] 19; James Ford, *The Enforcement of Housing Legislation,* 41 POL. SCI. Q. 549; Harold Seaton Irwin, *Zoning Ordinances,* 31 DICK. L. REV. 29; D. F. J. Lynch, *Restricting the Location of Undertaking Establish-*

"The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their

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ments, 14 GEORGETOWN L. J. 352; Eugene McQuillan, *Constitutional Validity of Zoning under the Police Power,* 11 ST. LOUIS L. REV. 76; Ulysses Marinoni, *A Word on Police Power* (aesthetic purposes), 4 LOYOLA L. J. 34; George W. Meuth, *Constitutionality of Zoning Ordinances,* 14 Ky. L. J. 23; Philip Nichols, *City Planning and the Constitution,* 6 BOST. U. L. REV. 153; Wassel Randolph, *City Planning in Tennessee,* 3 TENN. L. REV. 26; George Siefkin, *Kansas Decision Broadens Law of Zoning,* 12 NAT. MUN. REV. 286; Irvin Stewart, *Zoning and the Courts in Texas,* 13 NAT. MUN REV. 321; Ralph Straub, *Municipal Regulation of Billboards,* 28 LAW NOTES 68; Herbert S. Swan, *The Law of Zoning,* 10 NAT. MUN. REV. 517; Charles W. Tooke, *Methods of Protecting the City Plan in Outlying Districts,* 15 GEORGETOWN L. J. 127; Frederick V. Wells, *The Law of Zoning in Missouri,* 34 LAW SERIES MO. BUL. 3; Frank B. Williams, *The Law of the City Plan,* 9 NAT. MUN. REV. 661; and *The Krumgold Case, The Last Word on Zoning in New Jersey,* 15 NAT. MUN. REV. 199; and J. S. Young, *City Planning and Restrictions upon the Use of Property,* 9 MINN. L. REV. 518, 593.

safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [40]

The reference to the restrictions which are pertinent to the inquiry before the court is a reminder that the court is not passing judgment upon the ban on building two-family houses[41] in the first-class zone, or upon the restriction against churches, schools and public buildings in the first- and second-class zones, since the parcel before the court was not affected thereby. The complainant alleged that the exclusion of business buildings from

[40] 272 U. S. 365, 394-395 (1926).

For law-review discussions of the general problem of zoning, see notes in 13 CALIF. L. REV. 417; 97 CENT. L. J. 129; 24 COLUM. L. REV. 640; 25 COLUM. L. REV. 1047; 20 ILL. L. REV. 513; 21 ILL. L. REV. 284; 10 MARQ. L. REV. 1611; 3 NOTRE DAME LAW. 95; 5 OREG. L. REV. 140; 2 TEMP. L. Q. 67; 72 U. PA. L. REV. 421; 12 VA. L. REV. 65, 75; 32 YALE L. J. 833; and 35 YALE L. J. 238. On aesthetics as a basis for exercise of police power, see 10 VA. L. REV. 224; 30 W. VA. L. Q. 191; and 39 W. VA. L. Q. 195.

For discussions during the triennium 1919-1922, see notes in 9 CALIF. L. REV. 164; 19 MICH. L. REV. 191; and 30 YALE L. J. 171, 174, 204, 205, 292.

Prior to 1919 problems of zoning were considered in notes in 21 LAW NOTES 62, on aesthetics and the law; in 10 ILL. L. REV. 306 and 15 MICH. L. REV. 75, on establishment of residential districts; in 18 COLUM. L. REV. 162, on effect of zoning restriction upon specific performance of contract for sale of realty. On exclusion of stores from residence districts, see 14 COLUM. L. REV. 458; 27 HARV. L. REV. 571, 588; 11 MICH. L. REV. 610; 26 YALE L. J. 151; and 31 YALE L. J. 783.

[41] On restrictions as to residential buildings, see 12 CALIF. L. REV. 428, on forbidding more than two-family house; 10 MINN. L. REV. 48, 62, on restraint against four-family house; and 10 CORNELL L. Q. 389, on exclusion of apartment and fraternity houses.

part of his land reduced its value from $150 a front foot to $50 a front foot and that his land was worth $10,000 an acre for industrial uses but only $2,500 an acre for residence uses. The court apparently accepted these figures together with the finding below that the normal and natural development of the complainant's land would be for mercantile and industrial uses. In considering this natural use of the land and the need for such development because Euclid is part of the metropolitan area of Cleveland, Mr. Justice Sutherland said:

> "* * * But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in its way." [42]

[42] 272 U. S. 365, 389-390 (1926).

On special problems and collateral effects of zoning regulations, see notes in 18 NAT. MUN. REV. 102, on legislative interference with general zoning ordinance; 17 NAT. MUN. REV. 606, on discrimination because of exemption of municipal property; 3 TEMP. L. Q. 320, on discrimination because of unrestricted discretion to grant or deny building permits; 17 NAT. MUN. REV. 538, on power to enact temporary ordinance; 27 MICH. L. REV. 472, on delegation of power to remove restriction on funeral parlor; 10 BOST. U. L. REV. 116, on revocation of permit violating zoning ordinance; 1 So. CALIF. L. REV. 97, on case holding that zoning law does not permit nuisance in locality zoned for business in question; 37 YALE L. J. 387, on case holding that private parties specially damaged may enjoin violation of zoning ordinance; 25 COLUM. L. REV. 495 and 38 HARV. L. REV. 392, on enjoining store as nuisance when forbidden by zoning law; 12 MINN. L. REV. 293, on permitting business building in area restricted by deeds to residences; 21 ILL. L. REV.

This concluding caveat seems to mean that the court might upset a restriction because it disagreed with a municipal authority as to the adequacy of the area open to industrial or other uses, quite aside from the question whether the individual lot-owner was entitled to complain because of peculiar hardship on him. This question of specific application is clearly left open in every case. Doubtless it may not be considered when the complainant has failed to exhaust the opportunities of administrative amelioration. Failure to seek administrative grace in the case at bar was held not to prevent resort to equity, since "the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety." [43] Included in the ordinance were restrictions as to height of buildings, materials of construction and area of lot which might be occupied. The zones for these restrictions were not co-terminous with the zones of restrictions against use and occupancy. These were sustained on the authority of cases sanctioning restriction of the height of buildings,[44] prohibition of the maintenance of billboards [45] and suppression or localization of more

503, on restrictive covenants for residence purposes only; 2 U. CIN. L. REV. 447 and 77 U. PA. L. REV. 529, on revocation of building permit; and 12 MARQ. L. REV. 165, on discrimination in prohibition of wooden garages by exemption of ones previously erected.

[43] 272 U. S. 365, 386 (1926).

[44] Citing Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567 (1919), which is discussed in Anonymous, *Police Power and Sky Scrapers,* 13 LAW NOTES 87, and in a note in 69 CENT. L. J. 37. The case in the state court is noted in 55 AM. L. REG. (now U. PA. L. REV.) 260.

For other discussion of restriction of height of buildings, prior to 1922, see R. S. Wiggin, *The Power of the State to Restrict the Use of Real Property,* 1 MINN. L. REV. 135; O. H. Myrick, *The Erection and Maintenance of Buildings,* 66 CENT. L. J. 443; and notes in 34 AM. L. REV. 444; 14 HARV. L. REV. 616; 25 W. VA. L. Q. 246; and 12 YALE L. J. 456.

For discussion between 1922 and 1930 on limiting the height of buildings near the Wisconsin state capitol, see 23 COLUM. L. REV. 682; 24 COLUM. L. REV. 640; 37 HARV. L. REV. 390; 8 MINN. L. REV. 248; 10 VA. L. REV. 163; 2 WIS. L. REV. 443; and 33 YALE L. J. 554. In 1 U. CIN. L. REV. 361, is a note on height, bulk, and set-back ordinances.

[45] Citing Thomas Cusack Co. v. Chicago, 242 U. S. 526, 37 Sup. Ct. 190

commonly recognized noxious enterprises.[46] To the complaint that many of the industrial enterprises banished from residential and business districts are neither offensive nor dangerous, Mr. Justice Sutherland answered:

> "* * * But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. * * * The inclusion of a reasonable margin to ensure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad

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(1917), which is the subject of notes in 84 CENT. L. J. 155; 3 CORNELL L. Q. 135; 15 MICH. L. REV. 502; 1 MINN. L. REV. 441, 460; 2 So. L. Q. 233; 65 U. PA. L. REV. 686; and 26 YALE L. J. 420. The case in the state court is considered in Everett L. Millard, *Present Legal Aspect of the Billboard Problem,* 11 ILL. L. REV. 29; and in a note in 10 ILL. L. REV. 304. The Cusack Case was re-affirmed in St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274 (1919), on which there is comment in 28 YALE L. J. 835.

For discussion of restrictions on billboards and other advertising signs, prior to 1922, see Anonymous, *Billboards on Private Property,* 70 ALBANY L. J. 61; Anonymous, *Aesthetic Enjoyment as an Object of Legislation,* 9 LAW NOTES 87; Henry P. Chandler, *The Attitude of the Law Toward Beauty,* 8 AM. B. A. J. 470; Wilbur Larremore, *Public Aesthetics,* 20 HARV. L. REV. 55; Philip Sachs, *Aesthetics and the Law,* 15 LAW NOTES 126; Henry T. Terry, *The Constitutionality of Statutes Forbidding Advertising Signs on Property,* 24 YALE L. J. 1; and notes in 3 COLUM. L. REV. 587; 6 COLUM. L. REV. 122; 9 COLUM. L. REV. 186; 18 GREEN BAG 428; 17 HARV. L. REV. 275, 279; 4 MICH. L. REV. 385; 7 MICH. L. REV. 688; 8 MICH. L. REV. 598; 14 MICH. L. REV. 235; 16 MICH. L. REV. 34; 65 U. PA. L. REV. 372; 2 VA. L. REV. 70, 82; 3 VA. L. REV. 322; 10 YALE L. J. 223; 14 YALE L. J. 53; 15 YALE L. J. 248; and 27 YALE L. J. 287. On application to billboards of regulations against fire see 78 CENT. L. J. 237 and 12 ME. L. REV. 39.

For consideration of billboard regulation between 1922 and 1930, see notes in 13 MASS. L. Q. (No. 6) 74; 17 NAT. MUN. REV. 769; 18 NAT. MUN. REV. 41; and 12 ST. LOUIS L. REV. 76. On advertising signs see notes on prohibiting signs of a certain size, in 6 BOST. U. L. REV. 305 and 13 VA. L. REV. 581; on excluding advertising signs from residence district, in 14 VA. L. REV. 394; and on reasonableness of amount required for license fee, in 4 U. CIN. L. REV. 102.

[46] Citing Hadacheck v. Sebastion, 239 U. S. 394, 36 Sup. Ct. 143 (1915), sustaining a statute prohibiting brick-making within a designated area, and Reinman v. Little Rock, 237 U. S. 171, 35 Sup. Ct. 511 (1915), sustaining a statute excluding a livery stable from a designated area. For law-review discussion of proscription of particular enterprises, see note 54 *infra.*

> fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' * * *" [47]

The question as to the area of a lot which may be occupied by a building came up more specifically in *Gorieb* v. *Fox*[48] in which a unanimous court denied that there is a constitutional right of

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[47] 272 U. S. 365, 388-389 (1926).

Since the constitutional canons of the validity of zoning are assumed to derive somewhat from the law of nuisance, the following law-review discussions of the law of nuisance are here listed: George W. Meuth, *Garages and Automobile Supply Stations as Nuisances,* 13 KY. L. J. 288; and notes on "nuisances, permanent and temporary," in 29 W. VA. L. Q. 205; on doctrine of comparative injury in suits to enjoin, in 6 TEX. L. REV. 83; on delegation of discretionary power to officer to abate nuisance, in 41 LAW SER. MO. BUL. 15; on gasoline filling stations in 3 ALA. L. REV. 282; 5 ALA. L. REV. 65; 26 MICH. L. REV. 941; 12 MINN. L. REV. 669; 7 N. CAR. L. REV. 77; 2 TEMP. L. Q. 292; 4 TEMP. L. Q. 193; 7 TEX. L. REV. 304; and 37 YALE L. J. 391; on garages, in 5 BOST. U. L. REV. 441; 33 DICK. L. REV. 158; 34 DICK. L. REV. 59; and 3 TEMP. L. Q. 449; on livery stable, in 3 TEMP. L. Q. 225; on undertaking establishment, in 38 LAW SER. MO. BUL. 44; 21 MICH. L. REV. 475; 26 MICH. L. REV. 942; 2 ROCKY MT. L. REV. 203; 9 ST. LOUIS L. REV. 52; 6 TEX. L. REV. 546; 12 VA. L. REV. 428; 13 VA. L. REV. 656; 14 VA. L. REV. 403; and 2 WIS. L. REV. 113; on amusement parks, in 24 COLUM. L. REV. 806 and 5 WASH. L. REV. 132; on church in residential district, in 3 TEX. L. REV. 326; on lying-in hospital, in 11 KY. L. J. 173; on barbecue stand, in 2 ALA. L. REV. 52; on spite fence, in 7 NEB. L. BUL. 291; on lumber pile from motive of annoyance, in 27 MICH. L. REV. 349; on stone crushing (balance of convenience), in 37 YALE L. J. 96; on blasting (economic unavoidability as a defense), in 77 U. PA. L. REV. 550; on boiler plant, in 21 MICH. L. REV. 105; on sale of liquor in New York where not forbidden, in 2 CORNELL L. Q. 509; on white tanks reflecting sun's rays on neighbor's porch, in 28 MICH. L. REV. 211; and on illuminated sign shining into hotel bed-room, in 10 VA. L. REV. 400. For discussions prior to 1922, see note 52, *infra.*

[48] 274 U. S. 603; 47 Sup. Ct. 675 (1927), on which there is comment in 13 IOWA L. REV. 78, 101, and 2 U. CIN. L. REV. 314. On other set-back ordinances, see notes in 27 MICH. L. REV. 959 and 1 U. CIN. L. REV. 361. Prior to 1922 there is discussion of the requirement of a 25-foot set-back in 22 THE BAR 40, and of the establishment of building lines in 34 HARV. L. REV. 419, 433; 19 MICH. L. REV. 327; and 7 VA. L. REV. 661.

a landowner to erect a store on the street line of his lot and sustained a restriction which forbade construction within thirty-five feet of the street line when this set-back requirement of thirty-five feet was seven feet nearer the street than the established building line conformed to by over sixty percent of the buildings in the block. After citing the *Euclid* Case for the proposition that "comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected * * * and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the Federal Constitution",[49] Mr. Justice Sutherland continued:

> "* * * It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. * * * State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." [50]

An earlier decision which had annulled a set-back ordinance [51] was distinguished on the ground that it had required the committee on streets to fix a building line upon the request of the owners of two-thirds of the property abutting on any street, whereas the ordinance at bar itself established a building line with reference to the location of sixty percent of the existing

[49] 274 U. S. 603, 608 (1927).

[50] *Ibid.*

[51] Eubank v. Richmond, 226 U. S. 137, 35 Sup. Ct. 76 (1912), which is the subject of notes in 26 HARV. L. REV. 367; 11 MICH. L. REV. 401; and 18 VA. L. REG. 708.

buildings on the street and reserved to the council an authority to make exceptions. This standard of sixty percent of the existing buildings was attacked by the complainant as too vague, but the contention was thrust aside by the court for the reason that on complainant's block some eighty percent of existing buildings varied less than a foot from the established set-back line of forty-two feet. The complainant had taken advantage of the power of indulgence reserved by the city council and had obtained permission to erect a store in a block in a residence district and to approach seven feet nearer the street line than eighty percent of the existing houses. Notwithstanding this clemency, he had the bad grace to complain that the ordinance denied the equal protection of the laws because it permitted the council to discriminate between different lot owners. Mr. Justice Sutherland declared that the delegation or reservation is not in itself a denial of equal protection and that "it will be time enough to complain when, if ever, the power shall be" exercised by the council capriciously, arbitrarily or with inequality.[52]

[52] For consideration of the law of nuisance, prior to 1922, see Frank J. Goodnow, *Summary Abatement of Nuisances by Boards of Health*, 2 COLUM. L. REV. 203; Eugene McQuillan, *Abatement of Smoke Nuisances in Large Cities by Legislative Declaration that Discharge of Dense Smoke is a Nuisance Per Se*, 60 CENT. L. J. 343; Henry Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances*, 8 ILL. L. REV. 19; and notes on necessity of hearing in adjudicating nuisance, in 14 YALE L. J. 177; on mandamus to compel abatement of public nuisance, in 1 ILL. L. REV. 618; on continued actions where nuisance abatable, in 9 COLUM. L. REV. 538, 558; on statutory declarations of public nuisance, in 18 COLUM. L. REV. 346; on power of state to punish for nuisance done in another state, in 24 YALE L. J. 323; on undertaking establishments and morgues, in 33 HARV. L. REV. 613; 4 IOWA L. BUL. 63; 16 MICH. L. REV. 136; 19 MICH. L. REV. 111, 450; 59 U. PA. L. REV. 659; and 1 WIS. L. REV. 119; on pest house, in 3 MINN. L. REV. 286 and 28 YALE L. J. 699; on tuberculosis sanitarium, in 11 COLUM. L. REV. 292; 24 HARV. L. REV. 407; 59 U. PA. L. REV. 531; and 64 U. PA. L. REV. 528; on stables and barns, in 14 HARV. L. REV. 391; 15 LAW NOTES 150; and 63 U. PA. L. REV. 238; on garages, in 18 MICH. L. REV. 234 and 27 YALE L. J. 288; on powder plants, explosives and blasting, in 4 CALIF. L. REV. 74; 11 YALE L. J. 62; 12 YALE L. J. 459; and 18 YALE L. J. 436; on fireworks, in 6 COLUM. L. REV. 281; on operation of trains and engines, in 6 COLUM. L. REV. 595; 7 COLUM. L. REV. 69; 9 COLUM. L. REV. 558; 11 COLUM. L. REV. 382; 14 COLUM. L. REV. 590, 610; and 62 U. PA. L. REV. 319, 321; on dense smoke from factory, in 7 COLUM. L. REV. 550; on foundry, in 15 YALE L. J. 199; on cement works, in 25 HARV. L. REV. 474; on cotton

A restriction against use for business buildings was unanimously sustained in *Zahn* v. *Board of Public Works*[53] which involved a lot adjoining a main thoroughfare in Los Angeles and one whose value would be greatly enhanced if the restriction were removed. Mr. Justice Sutherland pointed out, however, that much of the land within the restricted district was subject to covenants against business uses and that the entire neighborhood was largely unimproved when the zoning plan was adopted, and declared that it was impossible for the court to say that the conclusion of the city council was clearly arbitrary or unreasonable.[54]

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gin, in 7 VA. L. REV. 661; on granite quarries, in 62 U. PA. L. REV. 661; on sugar refining plant, in 8 MICH. L. REV. 688; on coal docks, in 3 CALIF. L. REV. 503; on manufacturing in residence district, in 59 CENT. L. J. 201; on printing machine in district devoted to printing trade, in 19 HARV. L. REV. 474; on printing machine in house adjoining residence, in 6 COLUM. L. REV. 458, 472; on theatre and bowling alley, in 3 CORNELL L. Q. 233; on roller-skating rink, in 21 YALE L. J. 414; on county jail, in 18 YALE L. J. 199; on piano playing in adjoining flat at unreasonable hours, in 59 CENT. L. J. 81; on stagnant water, in 58 U. PA. L. REV. 327; on house of ill-fame, in 6 COLUM. L. REV. 56; on pool room, in 7 COLUM. L. REV. 357, 364; and on beer garden, in 12 YALE L. J. 458.

[53] 274 U. S. 325, 47 Sup. Ct. 594 (1927).

On restrictions against business uses in residence districts, see notes in 25 COLUM. L. REV. 495; 38 HARV. L. REV. 692; 9 MINN. L. REV. 676; 14 MINN. L. REV. 86; and 11 VA. L. REV. 142.

For discussion prior to 1922, see Walter F. Meier, *Legality of Municipal Zone Ordinances,* 20 LAW NOTES 186; Chelsea J. Rockwood, *The Minnesota Residence Act of 1915,* 1 MINN. L. REV. 487; David A. Sondel, *Validity of Legislation Creating Residence Districts,* 2 MARQ. L. REV. 27; and notes in 14 COLUM. L. REV. 458; 27 HARV. L. REV. 571, 588; 10 ILL. L. REV. 306; 11 MICH. L. REV. 610; 15 MICH. L. REV. 75; 26 YALE L. J. 151; and 31 YALE L. J. 783.

[54] On restrictions against locations of particular enterprises, see discussions of filling stations in 15 KY. L. J. 349; 10 MINN. L. REV. 267; 18 NAT. MUN. REV. 409; and 14 VA. L. REV. 61, 70; of location of hospital in 18 NAT. MUN. REV. 185; of tailor shop in 34 YALE L. J. 916; of mortuary building or funeral parlor in 24 ILL. L. REV. 335 and 27 MICH. L. REV. 472; and of scrap yard in 9 VA. L. REV. 560.

For law-review notes on similar subjects prior to 1922, see consideration of laundries and emission of smoke in 2 CALIF. L. REV. 58; 4 CALIF. L. REV. 416; 16 COLUM. L. REV. 239, 262; 8 MICH. L. REV. 424; and 9 MICH. L. REV. 266; of liveries in 11 MICH. L. REV. 168; of garages and filling stations in 22 COLUM. L. REV. 376; 10 ILL. L. REV. 306; 7 IOWA L. BUL. 260; 20 MICH. L. REV. 455; 4 MINN. L. REV. 540; and 8 VA. L. REV. 208; of crematories

No such deference was extended to the judgment of the City Fathers of Cambridge, Massachusetts, in *Nectow* v. *Cambridge*[55] which unanimously relieved a lot owner of a zoning classification which excluded part of his land from industrial uses. The master had found that the strip in question could not profitably be developed for residential purposes and that its retention in the residential zone would not promote the health, safety, convenience and general welfare of the Cantabrigians. The parcel was on the edge of an industrial area and might be included therein by a simple modification of the general zoning plan. This alone, says Mr. Justice Sutherland, would not be enough to warrant the court in overruling the judgment of the municipal authorities, but the finding that the restriction would not promote the welfare of the community, confirmed by the state court, and concurred in by the Supreme Court, deprives the municipal action of its requisite constitutional justification.[56]

in 2 CALIF. L. REV. 403; of tuberculosis sanitarium in 20 MICH. L. REV. 457; of undertaking establishments in 19 MICH. L. REV. 353; of gas works in 14 YALE L. J. 280; of cotton gins in 8 MICH. L. REV. 600; and of stone quarry in 6 COLUM. L. REV. 199 and 15 YALE L. J. 149.

[55] 277 U. S. 183, 48 Sup. Ct. 447 (1928), considered in notes in 8 BOST. U. L. REV. 330; 17 NAT. MUN. REV. 423; and 7 TEX. L. REV. 157. Another case in which a change from an industrial to a residence district was held void is discussed in 11 VA. L. REV. 142. On other instances of alleged peculiar hardship, see notes in 14 MINN. L. REV. 86, on requiring abandonment of existing business; in 27 MICH. L. REV. 972 and 39 YALE L. J. 735, on retroactive character of zoning ordinance; in 41 HARV. L. REV. 667, on effect on vested rights of change in ordinance; and in 39 YALE L. J. 1220, on land-value depreciation caused by ordinance as ground for relief.

[56] On various regulations of condition and use of buildings, see notes in 28 COLUM. L. REV. 374, on forbidding cooking in apartment hotels; in 99 CENT. L. J. 293, on prohibiting revolving doors; and in 4 NOTRE DAME LAW. 488, on prohibiting more than three automobiles in buildings occupied as living quarters.

For discussion prior to 1922, see Henry C. Hall and John H. Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501; O. H. Myrick, *The Erection and Maintenance of Buildings*, 66 CENT. L. J. 443; R. S. Wigging, *The Power of the State to Restrict the Use of Real Property*, 1 MINN. L. REV. 135; and notes on a discriminatory tenement-house law not applying to existing buildings, in 2 CALIF. L. REV. 58; on regulation of theatres, in 9 MICH. L. REV. 534; on requiring theatre owners to employ fire guard approved by fire commissioners at compensation provided by statute, in 68 U. PA. L. REV. 363; on sewers in tenement houses, in 4 COLUM. L. REV. 299; on plumbing in tenements, in

An ordinance which made the legality of constructing a philanthropic home for the old or the young in a "first residence district" dependent upon securing the written consents of the owners of two-thirds of the property within four hundred feet of the proposed dwelling was declared unconstitutional by a unanimous court in *Washington* v. *Roberge* [57] for the specific reason that the delegation of power to neighbors was a denial of due process of law to the aggrieved almoner.[58] Mr. Justice Butler carefully states that the court need not consider whether the legislature might decree the exclusion of such a refuge for the aged from a district primarily one devoted to private dwellings, but he points out that there is nothing in the record to show that the proposed home for the aged poor "is liable to work any injury, inconvenience or annoyance to the community, the district or any person", thereby differentiating the delegation in this case from that sustained in a case making the maintenance of billboards dependent upon the consents of adjacent property owners. His earlier statement that the legislative enactment by vesting power in neighbors plainly implies that nothing "in the proposed building and use would be inconsistent with public health, safety, morals or general welfare" is of course as applicable to proscription of billboards as of homes for the aged, so that the two cases together indicate that the delegation alone is not an insuperable vice. Apparently uses sufficiently noxious may be conditioned on the consent of neighbors, while lesser variations from the neighborhood

5 COLUM. L. REV. 59; on forbidding repair of wooden buildings, in 8 MICH. L. REV. 423; on uncompensated destruction of buildings in course of military operations, in 22 HARV. L. REV. 542; on forbidding retail sales in sub-basements, in 10 ILL. L. REV. 150; and on New Orleans "rat-proofing" ordinance, in 1 So. L. Q. 50.

[57] 278 U. S. 116, 49 Sup. Ct. 50 (1928), discussed in 27 MICH. L. REV. 712; 13 MINN. L. REV. 507; 18 NAT. MUN. REV. 42; 7 NO. CAR. L. REV. 315; and 4 NOTRE DAME LAW. 334. On the case in the court below, see 3 WASH. L. REV. 58.

[58] On questions of delegation of power to property owners, see Harold C. Havighurst, *Property Owners' Consent Provisions in Zoning Ordinances,* 36 W. VA. L. Q. 175; and a note in 27 MICH. L. REV. 572.

For discussion of such delegation, prior to 1922, see Howard Lee McBain, *Law Making by Property Owners,* 26 POL. SCI. Q. 617; and notes in 14 COLUM. L. REV. 458; 27 HARV. L. REV. 571, 588; 11 MICH. L. REV. 610; and 4 MINN. L. REV. 540.

norm may not. Here the proposed institution would occupy only four per cent of a five-acre tract, would be over one hundred feet from the nearest building and would be largely concealed by shrubs and trees. The district was open to fraternity houses, sorority houses or boarding houses occupied by students and under the supervision of public or private school authorities if the zoning board so decided notwithstanding lack of consent from neighbors. One may well doubt whether this was an appropriate application of the canon that "youth will be served" and thus find in the differentiation between young and old an arbitrariness that would be condemned by the court even though no delegation to neighbors were involved.[59]

[59] The exclusion of negroes from ownership or occupancy of land by means of mutual covenants between neighboring owners was held in Corrigan v. Buckley, 271 U. S. 323, 46 Sup. Ct. 521 (1923) to raise no constitutional issue authorizing appeal to the Supreme Court from the Court of Appeals of the District of Columbia. Technically the case is one of construction of the statutes relating to the federal courts, but it shows that private covenants to secure residential race segregation without aid of any authority derived from the state would not raise any issue under the federal Constitution.

For comments on this case, see Harold M. Bowman, *The Constitution and Common Law Restraints on Alienation,* 8 BOST. U. L. REV. 1; Andrew A. Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation,* 21 ILL. L. REV. 704; and a note in 12 CORNELL L. Q. 400. For an earlier discussion of the problem, see Alfred E. Cohen, *Racial Restrictions in Covenants in Deeds,* 6 VA. L. REG. [N. S.] 737. In 35 YALE L. J. 755, is a note on enforcement of covenants not to convey to Negroes, and in 8 TEX. L. REV. 298, a discussion of power to punish persons violating agreements for residential race segregation. For other consideration of residential race segregation, see notes in 10 MINN. L. REV. 62; 1 TEMP. L. Q. 157; 74 U. PA. L. REV. 93; and 36 YALE L. J. 274.

A statutory effort to secure residential race segregation was declared unconstitutional in Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16 (1917), on which there is comment in S. S. Field, *The Constitutionality of Segregation Ordinances,* 5 VA. L. REV. 81; and notes in 85 CENT. L. J. 422; 18 COLUM. L. REV. 147; 3 CORNELL L. Q. 133; 31 HARV. L. REV. 475; 21 LAW NOTES 162, 163; 16 MICH. L. REV. 109; 2 MINN. L. REV. 57; and 27 YALE L. J. 407. For other discussions of the problem, see T. B. Bencon, *Segregation Ordinances,* 1 VA. L. REG. [N. S.] 330; Warren B. Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance,* 11 COLUM. L. REV. 24; James F. Minor, *Constitutionality of Segregation Ordinances,* 18 VA. L. REG. 561; and notes in 78 CENT. L. J. 2; 15 COLUM. L. REV. 545; 27 HARV. L. REV. 270, 279; 18 LAW NOTES 103; 12 MICH. L. REV. 215; 13 MICH. L. REV. 599; 17 MICH. L. REV. 96; 1 ST. LOUIS L. REV. 70; 62 U. PA. L. REV. 312; 63 U. PA. L. REV. 895; 1 VA. L. REV. 333; 2 VA. L. REV. 82; and 3 VA. L. REV. 304, 320.

These zoning cases illustrate vividly the extent to which the Supreme Court of the United States at Washington sits as an appellate tribunal on the petty particularities of every urban lot in the land. Granted that Mr. Nectow had a grievance that a wise government would wish to redress, it still remains a serious question whether it would not be better that he and his fellow-sufferers should be bound by the judgments of an inclement state court than to make the Supreme Court of the United States listen to the plaint of every proprietor of every parcel of real estate in the wide expanse from Maine to California. If our state courts are not wise enough or kind enough to prevent local zoning authorities from committing atrocities, it is a misfortune for those who suffer thereby. Yet what person in his senses would think of planning a governmental scheme for a continent under which nine men at the national capital should decide whether a zoning boundary should be extended another one hundred feet before it turns a corner? The judgment on such a question derives from nothing in the law books. It comes from a simple sense of human fairness. Perhaps some of our state courts are so devoid of wisdom and perception and normal human capacity that we need a higher authority to lay down some general canons to guide them. Perhaps even with such canons, there may be state judges with incapacity to apply them to the checkerboard of real-estate boundaries. Yet even if this be so, what normal man could think it wise that every problem of individual application should be appealable to a national tribunal, whether of judges or city-planning experts or industrial engineers? The answer must be the same even on the hypothesis that the Supreme Court is invariably wiser than the judges who sit in the capitals of the states. The question may be asked without invidiousness when it is prompted by a decision that is not open to criticism on its intrinsic merits. These are days of sensitiveness on the line of demarcation between national and local authority. Few question the canon that matters of exclusively local importance should be left to local authorities. Men do not always agree about the application of the canon, but they could hardly disagree that the question whether a little more of Mr. Nectow's Cambridge lot should be open to industrial uses is of no concern to any one beyond the Berkshires.

It is fortunate for the policy of zoning that the practice had become so wide-spread before the issue of its constitutionality reached the Supreme Court of the United States. There is reason to believe that for a time the issue hung more closely in the balance than appears from the final vote of the court. To secure the approval of Mr. Justice Sutherland, it may have been important that he could assimilate zoning restrictions to the age-old power to suppress physical nuisances of a distinctly noxious character. Yet it will not in the long run be wise if the tests of the limitations on zoning are borrowed from the law of nuisance. To think of apartment houses as nuisances may wring our hearts unduly when we pity the poor residents of Manhattan who dwell high in the air by the side of the canyon that is Park Avenue. To think of forbidden uses in terms of the physically noxious may promote false judgments on the propriety of leaving various minor matters to the preferences of owners of other parcels in the vicinage. Not until the economic implications of the zoning movement are frankly recognized by the courts can we hope for wisdom in the judicial veto of legislative and administrative plans. Not until the economics of zoning is duly appreciated can the decisions which sanction zoning be given their deserved force as precedents for the constitutionality of other legislation which derives from kindred communal aims.

There remain for consideration a few cases which involve such varied subjects as fertilizers and comforters, shrimps and oysters and fish-nets and furs. In only one of the cases is health the professed aim of the statute involved. Some of the cases have been presented earlier in connection with the proprietary power of the state.[60]

A statute of Maryland which required those who buy oysters and prepare them for market at a fixed place to deliver to the state ten per cent of their empty oyster shells or to pay to the state their market value was sustained in *Leonard* v. *Earle*[61] as a proper exercise of the taxing power notwithstanding the complaint that compulsion to deliver would be a taking of property

[60] *Supra,* pages 44-46.
[61] 279 U. S. 392, 49 Sup. Ct. 372 (1929).

without compensation. Police considerations were invoked by Mr. Justice McReynolds when he said:

> "* * * From the packer's standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money. Their value is not large and the part taken by the State will be so used as greatly to advantage the business of packing. The purpose in view is highly beneficent and the means adopted are neither arbitrary nor oppressive. The Federal Constitution may not be successfully invoked by selfish packers who seek to escape an entirely reasonable contribution and thereby to thwart a great conservation measure generally approved." [62]

No special power over wild life was invoked in this case as it was in *Lacoste* v. *Department of Conservation* [63] which sustained a severance tax on furs as a police measure justified by the power to conserve the animals by forbidding capture.[64] That power does not go so far as to require shrimps to be shucked before they are sent out of the state, since *Foster-Fountain Packing Co.* v. *Haydel* [65] holds that this is forbidden by the commerce clause. The opinion states that the shrimps become private property when captured under a statute that cannot be regarded as a conservation measure, but it is not wholly clear that Mr. Justice Butler is talking in terms of due process. Mr. Justice McReynolds thought that the state's power might be exercised to promote employment of labor within the state.

Miller v. *McLaughlin* [66] holds that the state may forbid the possession of nets, traps and seines for fishing purposes even if the intent is to use them for fishing outside the state.

A statute of Pennsylvania which forbade among other things

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[62] 279 U. S. 392, 396 (1929).

[63] 263 U. S. 545, 44 Sup. Ct. 186 (1924).

[64] For law-review discussion of issues raised by regulations concerning animals, see notes in 12 IOWA L. REV. 191, on regulation of contagious and infectious diseases; in 15 IOWA L. REV. 519, on eradication of bovine tuberculosis; in 7 BOST. U. L. REV. 137, on public ownership of wild animals; in 38 HARV. L. REV. 684, on case holding it unconstitutional to forbid killing of deer when killing is necessary to protect property; in 32 YALE L. J. 280, on prohibiting keeping of goats within fifty feet of a dwelling; and in 12 VA. L. REV. 509, on summary destruction of dogs.

[65] 278 U. S. 1, 49 Sup. Ct. 1 (1928).

[66] 281 U. S. 261, 50 Sup. Ct. 296 (1930).

the use of shoddy in the manufacture of comfortables was held offensive to the requirements of due process of law in *Weaver* v. *Palmer Brothers Co.*,[67] over the dissent of Justices Holmes, Brandeis and Stone. Mr. Justice Butler for the majority declared that the answer to the constitutional question "depends upon the facts of the case" which he found to be that there is no probability that "disease-producing * * * bacteria or vermin likely to carry them survive after the period usually required for the gathering of the materials, the production of shoddy, and the manufacture and the shipping of comfortables" and that it is conceded that "shoddy may be rendered harmless by disinfection or sterilization." For the uninitiated it may be revealed that "shoddy" was defined to mean "any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up." The manufacturer did not contest the requirement that second-hand materials must be disinfected and sterilized, and the case did not involve the issue whether the state could require a similar treatment of new materials, since the statute forbade use of any and all shoddy. The fact that the state allowed use of other second-hand materials after sterilization was adduced as a recognition that sterilization is an adequate protection against disease. The provision in the statute for inspection and tagging was thought to afford adequate protection against fraud. The case sustaining a statute forbidding the sale of oleomargarine notwithstanding exclusion of the offer to show that the particular articles sold were wholesome and nutritious was distinguished on the ground that "there it was assumed that most kinds of oleomargarine in the market were or might become injurious to health", while "here it is established that sterilization eliminates the dangers, if any, from the use of shoddy." The dissenting opinion of Mr. Justice Holmes invoked respect for the judgment of the legislature and the principle that the state may, when the line between good and evil is difficult to distinguish in practice, go beyond the line of actual evil in order to make sure that none of the evil escapes.

[67] 270 U. S. 402, 46 Sup. Ct. 320 (1926), which is the subject of comment in 12 VA. L. REV. 662. On the case in the lower court, see 73 U. PA. L. REV. 435. An earlier case holding a similar statute void for discrimination is noted in 25 YALE L. J. 594.

A statute of North Carolina providing for public inspection of fertilizers came before the court in *Jones* v. *Union Guano Co.*,[68] in an unsuccessful complaint by a purchaser against a provision requiring inspection as a condition precedent to suits for damages alleged to be due to defective fertilizer. The case did not involve the validity of any of the numerous requirements imposed to safeguard the quality of the product sold.

In only four of the cases primarily in this section was legislation declared unconstitutional. The court was unanimous in holding that Mr. Nectow ought to be allowed to devote his whole lot to industrial uses [69] and in ruling that neighboring lot-owners may not be vested with power to exclude an Old Folks Home from their midst.[70] In the other two cases there was difference of opinion. Mr. Justice Brandeis alone dissented from the conclusion that the state may not compel owners of the subsurface to give support to the land above when they have secured express covenants that they shall not be liable for causing subsidence of the surface.[71] He was joined by Justices Holmes and Stone in refusing to acquiesce in the decision that gave to shoddy a constitutional right to become a component part of a comforter.[72] Of dissent in the cases sustaining legislation, the only instance is that of Justices Van Devanter, McReynolds and Butler who disagreed with the action of their brethren in sustaining the general principle of zoning legislation.[73] In later cases, however, they joined in approving of a set-back ordinance [74] and of a prohibition against commercial uses in a zone restricted to residences.[75] Thus the disagreements about zoning in the future are likely to be confined to special applications that may be attacked as not sufficiently conducive to the public good or as unduly burdensome to the aggrieved victim.

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[68] 264 U. S. 171, 44 Sup. Ct. 280 (1924).
[69] Nectow v. Cambridge, *supra* note 55.
[70] Washington v. Roberge, *supra* note 57.
[71] Pennsylvania Coal Co. v. Mahon, *supra* note 15.
[72] Weaver v. Palmer Brothers Co., *supra* note 67.
[73] Euclid v. Ambler Realty Co., *supra* note 37.
[74] Gorieb v. Fox, *supra* note 48.
[75] Zahn v. Board of Public Works, *supra* note 53.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—V [1]

VI. PROPERTY INTERESTS

THE cases in this section deal largely with statutes regulating rights or interests in the land of another. Some are concerned with qualified interests in land, if this does not beg the issues to be decided. It may perhaps be debated whether the regulations are sustained because the property interests are qualified ones or whether the interests are qualified because there is constitutional power to impose the restrictions. Other cases deal with regulation of the methods of transferring property interests both in land and in rights under contract. Issues arising under the obligation-of-contracts clause are to be considered elsewhere. Under the heads of financial relations and of business conduct will be put some cases which involve property interests in intangible rights. All of our cases might have been put into the two groups of protection of liberty and protection of property, but a different classification has been deemed advantageous.

The alien land laws of Washington and of California brought four cases to the Supreme Court in which citizens unsuccessfully adduced the Fourteenth Amendment as a barrier against the restraints imposed upon them in respect to the disposition or use of their lands. *Terrace* v. *Thompson* [2] was a bill brought by a citizen and a Japanese subject against the attorney general of

[1] For the preceding instalments, see 17 VA. L. REV. 529-556, 653-675, 765-799, 18 VA. L. REV. 1-36.

[2] 263 U. S. 197, 44 Sup. Ct. 15 (1923), discussed in Thomas Reed Powell, *The Alien Land Cases in the United States Supreme Court*, 12 CALIF. L. REV. 259; and notes in 97 CENT. L. J. 37; 24 COLUM. L. REV. 202, 307; 37 HARV. L. REV. 372, 381; 18 ILL. L. REV. 398; 22 MICH. L. REV. 353; 9 ST. LOUIS L. REV. 150; 72 U. PA. L. REV. 148; and 10 VA. L. REV. 384. For other discussions of the problems raised by the alien land laws, prompted largely by decisions in the lower courts, see Maurice E. Harrison, *Legal Aspects of Alien Land Legislation on the Pacific Coast*, 8 A. B. A. JOUR. 467; and notes in 10 CALIF. L. REV. 494; 22 COLUM. L. REV. 751; 36 HARV. L. REV. 209, 225; 20 ILL. L. REV. 68; and 3 So. CALIF. L. REV. 423.

Washington to restrain the threatened enforcement of the statute forbidding the leasing of land to aliens who have not in good faith declared their intention to become citizens. Mr. Justice Butler pointed out that if the alien could be forbidden to receive, the citizen could be forbidden to grant, and the restraint upon the former he justified on the basis of the common-law inability of aliens to take land by operation of law and of previous decisions sanctioning the power of the state, in the absence of any treaty provision, to deny to aliens the right to own land within its borders. By way of reason he added that "the quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself." The statute was distinguished from one forbidding aliens to work in the ordinary occupations which had previously been declared unconstitutional under the due-process and equal-protection clauses. The discrimination in favor of citizens and of aliens who had in good faith declared their intention to become citizens was said to be on a reasonable basis, because the state may properly assume that Congress had sufficient justification in designating classes of aliens ineligible to become citizens and because "reasons supporting discrimination against aliens who may but who will not naturalize are obvious."

The California statute sustained in *Porterfield* v. *Webb* [3] confined the restrictions to aliens ineligible for citizenship, but Mr. Justice Butler observed that each state has different problems and therefore may adopt different bases of classification and that the failure to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens cannot be declared arbitrary or unreasonable.

Webb v. *O'Brien* [4] went farther and denied relief against threatened enforcement of the California statute against the consummation of a so-called "cropping contract" under which the alien without becoming a lessee or acquiring any technical "in-

[3] 263 U. S. 225, 44 Sup. Ct. 21 (1923). This case and the succeeding ones on the alien land laws are discussed in most of the articles and notes listed in note 2, *supra*.

[4] 263 U. S. 313, 44 Sup. Ct. 112 (1923). The decision below is discussed in notes in 36 HARV. L. REV. 209, 225, and 20 ILL. L. REV. 68.

terest in the land" was granted an assured right of occupancy and tillage in return for delivery of one-half of the crop. The incidents of the contract and its four-year term were said to distinguish it from one of mere employment and therefore to save the law from the condemnation previously visited upon the Arizona statute forbidding the employment of aliens in ordinary trades and occupations. In elaboration Mr. Justice Butler observed:

> "* * * The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such a contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. * * * We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders." [5]

While the California court had held that a similar contract was not within the prohibition of the statute in question, a later statute clearly covered it. This may afford a practical justification for the Supreme Court's casual treatment of the issue of statutory construction.

Frick v. *Webb* [6] declared that the state "may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens" and so declined to restrain the attorney general from taking steps to enforce the statutory prohibition against the acquisition by such an alien of shares of stock in any corporation that "is or may be authorized to acquire, possess, enjoy or convey agricultural land." In none of these cases did Mr. Justice Sutherland participate, and in all of them Justices McReynolds and Brandeis were of opinion that the constitutional issues

[5] 263 U. S. 313, 324 (1923).

[6] 263 U. S. 326, 44 Sup. Ct. 115 (1923). On the decision below, see note in 22 COLUM. L. REV. 751, on the nature of stockholder's interest in property of corporation.

involved were not properly determinable in the injunction proceedings.

A conviction for conspiring to effect a transfer of agricultural land to an alien was sustained in *Cockrill* v. *California*[7] in which the fight was over the provision that a *prima facie* presumption of intent to make a forbidden transfer should arise upon proof of taking the property in the name of a person entitled to take when the consideration was paid by one not so entitled. Mr. Justice Butler pointed out that the presumption is only *prima facie* and that the inference permitted to be drawn is not fanciful, arbitrary or unreasonable. The fact that the presumption was confined to payment by an ineligible alien was found to afford no just cause of constitutional complaint under the equal protection clause or under the treaty provision. As to the latter, the presumption applied to the citizen, and therefore the alien was not discriminated against.

A claim of a lessee under an agricultural lease from the State of Oklahoma that the state had deprived him of property without due process of law by making an oil and gas lease of the same land to others was rejected in *Price* v. *Magnolia Petroleum Co.*[8] in which Mr. Justice Sanford found that the Enabling Act admitting Oklahoma to statehood, on which the agricultural lessee relied for his claim of a preference right to purchase the land in its entirety, did not impose any such duty on the state in favor of agricultural lessees but merely required that, if the state chose to sell the land in its entirety, preference should be given to the agricultural lessee. The State therefore was free under the trust imposed by the Enabling Act to make oil and gas leases of land already subject to an agricultural lease. Under the lease of oil and gas rights, the defendant in the case was bound to pay to the agricultural lessee all damage accruing to the surface interest. It did not dispute this liability.

A Pennsylvania statute conferring the privilege of building a party wall partly upon the land of the adjoining owner was sustained in *Jackman* v. *Rosenbaum Co.*[9] chiefly out of respect for

[7] 268 U. S. 258, 45 Sup. Ct. 490 (1925).

[8] 267 U. S. 415, 45 Sup. Ct. 312 (1925).

[9] 260 U. S. 22, 43 Sup. Ct. 9 (1922), discussed in Nathan Isaacs, *Statutory Party Walls,* 71 U. PA. L. REV. 229; and a note in 32 YALE L. J. 398.

ancient custom in Pennsylvania from colonial times. The action was one for damages by the adjoining landowner who was deprived of the use of his theatre while his neighbor, under the condition imposed by the city authorities, took down complainant's wall on complainant's land and substituted for it a new party wall straddling the boundary line between them. The highest state court had held that "when either lot holder builds upon his own property up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." This ruling received from Mr. Justice Holmes the comment that "in a case involving local history, as this does, we should be slow to overrule the decision of courts steeped in the local tradition, even if we saw reasons for doubting it, which, in this case, we do not." While there is no indication in the opinion of the Supreme Court that such a party-wall statute could not be justified as a simple exercise of the police power in appropriate situations on the warrant of what, according to Mr. Justice Holmes, "we may call the average reciprocity of advantage, although the advantages may not be equal in the particular cases," the decision was distinctly based on the fact that "the custom of party walls was introduced by the first settlers in Philadelphia under William Penn, and has prevailed in the state ever since." On the question of the respect due to age, Mr. Justice Holmes goes on to say:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, * * * Such words as 'right' are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the

> landowner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power." [10]

There follows the suggestion that change of conditions might unhallow ancient custom, since "of course, a case could be imagined where the modest mutualities of simple townspeople might become something very different when extended to buildings like those of modern New York." Without noting any invidious differences between New York and Pittsburgh, Mr. Justice Holmes contents himself with pointing out that in the present case the wall was only thirteen inches wide, that only half of it was on plaintiff's land, and that "as the damage complained of was a necessary incident to any such building, the question how far the liability might be extended does not arise." [11]

An attempt by a city to create a public taxi stand on railroad property was held unconstitutional in *Delaware, L. & W. R. Co. v. Morristown.*[12] There was a question whether a contract between the railroad and the city afforded a justification for the requirement. This was decided in the negative. Mr. Justice

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[10] 260 U. S. 22, 31 (1922).

[11] In Walker v. Gish, 260 U. S. 447, 43 Sup. Ct. 174 (1923), a judgment by a prior builder of a party wall for use thereof by a subsequent adjacent builder was sustained on the ground that the use by the second builder constituted a waiver of any right to object to the payment provided for by the Act of Congress and subordinate administrative regulations. The land in question was outside the original Federal City in which the lots were sold under mutual restrictions entitling the first builder to straddle the line and recover payment from later neighboring builders who used the previously erected wall. The regulations applicable to the original Federal City had, however, been extended to the land later annexed, and the court of the District had held that widespread compliance had developed a custom which justified the implication of an agreement to allow the first builder to use the neighbor's land for a party wall and which thereby rebutted the inference of a trespass, and created an obligation on the part of the neighbor who later made use of the wall to render compensation therefor under the terms of the regulations. This ruling was approved by Mr. Chief Justice Taft, in the absence of any proof of objection to the initial construction of the party wall. The case leaves open the question whether the regulations may in the future be enforced as legislation against those who seek to prevent the initial construction of a party wall on their side of the line.

[12] 276 U. S. 182, 48 Sup. Ct. 277 (1928), discussed in 28 COLUM. L. REV. 816 and 76 U. PA. L. REV. 746. On the decision below, see 40 HARV. L. REV. 497; 11 MINN. L. REV. 370; and 16 NAT. MUN. REV. 272.

Brandeis and Mr. Justice Holmes confined their concurrence to the unconstitutionality of requiring the use of the railroad property for a completely public stand open to all cabs whether serving railroad patrons or not and indicated their view that it would be proper to make such regulations as would be necessary to secure adequate cab service for passengers alighting from incoming trains. Apparently Mr. Justice Butler for the majority was of opinion that such a regulation would require payment of compensation to the railroad, for he says:

> "* * * But, assuming that under the circumstances the creation of a public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. * * * The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment. * * *"[13]

Attention has already been given to *Pennsylvania Coal Co.* v. *Mahon*[14] which holds that a covenant reserving to the grantor of surface rights in land the right to mine coal underneath without liability for causing subsidence of the surface is protected by the Fourteenth Amendment against a statute forbidding mining causing such subsidence. Mr. Justice Holmes conceded that the end sought by the statute is legitimate, but insisted that it

[13] 276 U. S. 182, 193 (1927).

[14] 260 U. S. 393, 43 Sup. Ct. 158 (1922), *supra,* pages 96-98. This case is discussed in notes in 11 CALIF. L. REV. 188; 36 HARV. L. REV. 753; 21 MICH. L. REV. 581; 7 MINN. L. REV. 242; 1 N. Y. L. REV. 242; 71 U. PA. L. REV. 277; 9 VA. L. REV. 457; and 32 YALE L. J. 511. On the case in the court below, see 71 U. PA. L. REV. 77.

could be attained only through the exercise of the power of eminent domain and the payment of just compensation. Mr. Justice Brandeis would allow the police power to do the work, notwithstanding the result that it would in effect transform a deed not granting support into one giving the support gratis.[15]

Several cases already reviewed under the head of Governmental and Proprietary Powers may be briefly noticed here from the standpoint of the claimed property interest of individuals. Rights of riparian owners in navigable streams are matters of state law. The Supreme Court will intervene only to prevent state courts from defeating rights secured by the appropriate state law. In *Fox River Paper Co.* v. *Railroad Commission,*[16] the Supreme Court found that the state court was correct in holding that under the law of Wisconsin no riparian owner, even if holding title to the bed of a navigable stream, may erect a dam without the consent of the state. It was assumed by Mr. Justice Stone to follow therefrom that the state may condition its consent upon an undertaking by a would-be licensee to agree that the dam may later be condemned by the state upon payment of compensation determined by a state commission upon canons less generous than the "just compensation"

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[15] On property rights in air space, see Clement L. Bouvé, *Private Ownership of Airspace,* 1 AIR L. REV. 232, 376; Bertran J. Couture, *The Michigan Statute Regulating Aerial Navigation Is Void in So Far as It Is in Derogation of Vested Rights,* 11 BI-MONTHLY L. REV. 159; Harry J. Freeman, *Survey of State Aeronautical Legislation, 1928-1929,* 1 AIR L. J. 61; Richard J. Mollica, *The Extent of the Right of the Owner of Land to the Space Above,* 11 BI-MONTHLY L. REV. 135; Haselton Mirkil, *A Summary, in the Light of the Cases, of the Law in Relation to Aeronautics,* 4 TEMP. L. Q. 254; and notes on regulating air navigation over private land, in 22 COLUM. L. REV. 754 and 3 So. CALIF. L. REV. 413.

Problems of property interests are dealt with in Ezra Bowen, *The Concept of Private Property,* 11 CORNELL L. Q. 41; Bryant Smith, *Retroactive Laws and Vested Rights,* 5 TEX. L. REV. 231; and Hugh E. Willis, *Private Ownership—Its Characteristics and Legal History in the United States,* 6 ILL. L. Q. 197. On legislation affecting property rights of women, see Carrol R. Heft, *Women's Equality Legislation in Wisconsin,* 2 WIS. L. REV. 350; and Jennie McMullin Turner, *Women's Rights by Blanket Legislation,* 2 WIS. L. REV. 103.

[16] 274 U. S. 651, 47 Sup. Ct. 669 (1927), *supra,* pages 46-47, discussed in 1 DAK. L. REV. 143; 12 MARQ. L. REV. 80; and 2 WASH. L. REV. 248.

requisite for the valid exercise of the completely coercive power of eminent domain. The case involved an unsuccessful effort to get the license to erect the dam without filing the stipulated consent.

The settled law of Louisiana under which riparian lands are subject to a servitude in aid of navigation was held in *Mayor of Vidalia* v. *McNeely*[17] to justify the action of a town council in designating a section of complainant's riparian parcel as a landing place for a rival ferry. There appeared to be sufficient room for landing places for both ferries, and so far as appeared the ramps already erected by the riparian owner could still be used by him and his patrons for crossing to and from his docks.

On the other hand, in *Appelby* v. *New York*[18] and *Appelby* v. *Delaney*[19] the New York Court of Appeals was told that the law of New York was not what it thought it was, and that grants from the state of land under water carried with them rights which precluded the grantor from dredging and using the place for slips for permanent mooring of ships.

The qualified rights of landowners and others in fish and game have presented a number of cases referred to sufficiently elsewhere.[20]

A provision of the Illinois Torrens Act under which in the particular case a certificate of title issued by the registrar upon

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[17] 274 U. S. 676, 47 Sup. Ct. 758 (1927).

[18] 271 U. S. 364, 46 Sup. Ct. 569 (1926), reviewed *supra,* pages 16-18.

[19] 271 U. S. 403, 46 Sup. Ct. 581 (1926).

[20] Lacoste v. Department of Conservation, 263 U. S. 545, 44 Sup. Ct. 186 (1924), *supra,* pages 44-45; Foster-Fountain Packing Co. v. Haydell, 278 U. S. 1, 49 Sup. Ct. 1 (1928), *supra,* page 45; Leonard & Leonard v. Earle, 279 U. S. 392, 49 Sup. Ct. 372 (1929), *supra,* pages 45-46; Miller v. McLaughlin, 281 U. S. 261, 50 Sup. Ct. 296 (1930), *supra,* page 46.

For list of articles and notes on state power over waters, see *supra,* page 100, note 21.

No constitutional issues were involved in McKee v. Gratz, 260 U. S. 127, 43 Sup. Ct. 16 (1922), which came into the federal court by reason of diversity of citizenship. This held that under the Missouri law there might be recovery of damages for conversion by a trespasser who went upon land and gathered mussel shells, provided there was no local custom permitting entry for such purpose. The case was sent back for jury determination of this question of local custom.

a forged deed without notice to the existing owner was made conclusive against him was sustained in *Eliason* v. *Wilborn*[21] on the narrow ground that one who acquires his title under the Act must take it subject to the provisions thereof. Mr. Justice Holmes remarks that "even if the restrictions were of a kind that was open to constitutional objection the appellants bought knowing them, and got what they paid for, and knew that they were liable to lose their title without having parted with it and without being heard." Later he added that "there are few constitutional rights that may not be waived." The old certificate had been entrusted by the registered owner to the wrong-doer who forged the deed. The statute required the production of the old certificate as a condition precedent to the issue of a new one. The result of giving effect to the new certificate was deemed justifiable under the common-law rule that "as between two innocent persons, one of whom must suffer the consequence of a breach of trust, the one who made it possible by his act of confidence must bear the loss." To this it is no answer that under the statute the new certificate might have been conclusive even if the registrar had disregarded the statutory requirement to have its predecessor produced.[22]

The familiar rule that a mortgage may give to the mortgagee

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[21] 281 U. S. 457, 50 Sup. Ct. 382 (1930). On questions arising out of the Torrens system of land registration, see Loring M. Staples, *The Conclusiveness of a Torrens Certificate of Title,* 8 MINN. L. REV. 200; and notes in 12 CALIF. L. REV. 49; 1 U. CIN. L. REV. 472; and 14 VA. L. REV. 675.

[22] For discussion of questions relating to title of real estate, see G. A. Farabaugh and Walter R. Arnold, *Commentaries on the Public Acts of Indiana, 1927—II the Adverse Possession Act,* 4 IND. L. J. 112; F. C. Hackman, *Changes in Washington Land Title Recording Law,* 2 WASH. L. REV. 211; and Dorr Viele, *The Problem of Land Titles,* 44 POL. SCI. Q. 421.

Regulation of property interests in estates is considered in William E. Buerby, *The Meaning of the California Constitutional Provision Prohibiting Perpetuities,* 1 So. CALIF. L. REV. 107; Merrill I. Schnebly, *An Illinois Act for the Extinguishment of Future Interests Through Judicial Sale,* 24 ILL. L. REV. 853; and notes in 28 COLUM. L. REV. 1088, on proposed changes in the New York law of estates; and in 21 ILL. L. REV. 498, on right of legislature to take away inchoate right to destroy contingent remainder.

On questions relating to wills and inheritances, see Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents,* 13 CORNELL L. Q. 559; Robert E. Mathews, *Pretermitted Heirs: An Analysis of Statutes,* 29 COLUM. L. REV. 748; and *Trends in the Power to Disinherit Children,* 16 A. B. A. JOUR. 293; and notes in 43 HARV. L. REV. 485 and 34 YALE L. J. 97,

a power of sale on default without requiring him to give notice to later purchasers or incumbrancers was held in *Scott* v. *Paisley*[23] to be a sufficient answer to a constitutional objection to a Georgia statute under which substantially the same end was accomplished. Under this statute a creditor who had taken from his debtor a security deed conveying legal title to land was permitted after reducing the debt to judgment to quit-claim the land back to the debtor and then have the land levied upon and sold in satisfaction of the judgment. A purchaser of the land subject to the security deed desired to come in and redeem after the sale on execution had been completed, and insisted that the sale was void for want of notice to him, but Mr. Justice Sanford found no more reason for notice in such a case than in the more familiar situation of a mortgage which confers power of sale.[24]

A statute of New York providing for the seizure of the property of an absconding husband leaving dependents likely to become public charges, which had been interpreted by the New York court not to prevent the property owner from later contesting the facts upon which jurisdiction to order the seizure are necessarily predicated, was sustained in *Corn Exchange Bank* v. *Coler*[25] because of the ancient precedents of legislation authorizing such seizures without notice to the absent owner. The contention of the bank that it might have to pay a deposit twice was left without solace.

The constitutionality of escheating to the state all savings

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on administration of estate of missing person; and in 33 LAW NOTES 102, on judicial action in enforcing forfeiture of legacy for contest of will.

In 22 COLUM. L. REV. 674 is a note on Ferry v. Spokane, P. & S. Ry. Co., 258 U. S. 314, 42 Sup. Ct. 358 (1922), sustaining a statute limiting dower rights of non-resident widows to lands of which their husbands died seized, though resident widows retained dower in all lands of which their husbands had been at any time seized

[23] 271 U. S. 632, 46 Sup. Ct. 591 (1926).

[24] On questions arising out of mortgages, liens, debts and kindred matters, see notes in 23 COLUM. L. REV. 587, on discrimination in regulating chattel mortgages of crops; in 38 HARV. L. REV. 826, on power of state to apply assets of non-resident decedent exclusively to claims of citizen creditors; in 12 MINN. L. REV. 285, on regulating joint deposits; in 34 YALE L. J. 202, on restricting assignment of earned wages; and in 29 COLUM. L. REV. 996, on revision of mechanics lien law of New York.

[25] 280 U. S. 218, 50 Sup. Ct. 94 (1930).

deposits unclaimed for twenty years was re-affirmed in *Security Savings Bank* v. *California*[26] against various complaints of the bank confined to matters of procedure which seemed to it inadequate for its ultimate protection.[27]

As a basis for granting an injunction in favor of one cotton gin against the issue of a permit to another, it was declared in *Frost* v. *Corporation Commission*[28] that the former had received not a mere license but a franchise which is a property right. A cotton gin was declared by statute to be a public utility requiring a permit. "Under these conditions," says Mr. Justice Sutherland, "to engage in the business is not a matter of common right, but a privilege, the exercise of which, except by virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise." The next step in the decision was the holding that the possessor of this property right, concededly not an exclusive franchise, was denied the equal protection of the laws by reason of the fact that some others were granted the privilege of establishing cotton gins without having to secure the certificate of convenience and necessity required of the complainant. In dissenting, Mr. Justice Brandeis pointed out that the question whether the right is a property right depends upon the law of the state, and that the state court had held it a mere license. Justices Holmes and Stone joined in the dissent.

The familiar principle that power over public utilities carries with it power to compel the abrogation of private contracts inconsistent with the public duty to serve without discrimination involves necessarily the conclusion that the property interest in those contracts is qualified and tenuous. The cases which enforce the rule turn usually on the issue whether the enterprise is of the kind that comes within it.[29]

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[26] 263 U. S. 282, 44 Sup. Ct. 108 (1923).

[27] On somewhat analogous questions, see Edward Lees, *Property Rights of Persons Who Have Disappeared*, 9 MINN. L. REV. 89; and O. A. Wehle, *Is Escheat of Corporation Property "Due Process"?*, 14 KY. L. J. 136.

[28] 278 U. S. 515, 49 Sup. Ct. 235 (1929), discussed in 9 BOST. U. L. REV. 296; 29 COLUM. L. REV. 833; 24 ILL. L. REV. 812; 28 MICH. L. REV. 179; and 8 NO. CAR. L. REV. 87.

[29] Stimson Lumber Co. v. Kuykendall, 275 U. S. 207, 48 Sup. Ct. 1 (1927), discussed in 26 MICH. L. REV. 580, 691, and 76 U. PA. L. REV. 605; Sutter

Such cases, like several others included in this section, might have been fought out under the aegis of the obligation-of-contracts clause. The contracts clause would undoubtedly be much more frequently invoked had not the Fourteenth Amendment come to cover such a multitude of complaints. While claims for the protection of so-called vested rights dependent initially on contract may be as distinctly devoid of national significance as any other laments that appeal to the Fourteenth Amendment, such claims do not necessarily indicate an increase of judicial centralization following the Civil War. Confidence in the state governments was not unqualified even among the Fathers. It is quite possible that much of the protection now accorded to property and enterprise in the name of the Fourteenth Amendment would have been found to be commanded by the contracts clause if that had been the only possible shield. A court which can apply the concept of property to a permission to do something that might have been forbidden [30] would have sufficient intellectual acumen to find some contract basis for most hopes and expectancies that bewail legislative frustration. Indeed the strain might be quite as moderate as that which found that "due process" is not confined to due process but includes a caution of sweet reasonableness in commanding what should not be done.

Such divisions of opinion as appear in the cases in this section are those which one might anticipate from the disagreements reported earlier. Justices Holmes and Brandeis would not accord to a railroad a monopolistic power to choose what cabs should gather passengers from its trains.[31] With Mr. Justice Stone they would not permit one grantee of the privilege of running a cotton gin to complain that others were given a like privilege without showing the same reasons demanded of him.[32] Mr. Justice Brandeis alone would have allowed a statute to require a grantor to support a surface contrary to explicit denomination in the bond.[33] These three instances of dissent are all in cases declar-

Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 49 Sup. Ct. 325 (1929), considered in 3 So. CALIF. L. REV. 620.

[30] Frost v. Corporation Commission, note 28, *supra.*

[31] Delaware, L. & W. R. Co. v. Morristown, note 12, *supra.*

[32] Frost v. Corporation Commission, note 28, *supra.*

[33] Pennsylvania Coal Co. v. Mahon, note 14, *supra.*

ing legislation unconstitutional. The only other dereliction discovered in a state consisted of an impairment of its own grant of land under water.[34] The later legislation was found to offend against the contracts clause. The police power point in the cases appears in the holding that a state has power to part with its control over navigation by granting in fee the land under water.

VII. FINANCIAL RELATIONS

The cases here considered deal with regulations of insurance and banking or somewhat analogous modes of lending and borrowing. Sometimes the regulation takes the form of a prescription of corporate conduct. The justification may be phrased in terms of power over corporations. Such regulations are included here if they are concerned with the protection of claimants to payment of money. In a majority of the cases dealing with the control over insurance, the issue is whether the state is seeking to exercise its police power over acts outside its borders. Such issues may arise as readily from regulations dealing with personal conduct or physical conditions, with trade and with property interests. It chances that in the period under review they are presented mainly in cases involving insurance. It has therefore seemed permissible to present the issues of extraterritoriality here, without segregating them for inclusion under a separate head.

A North Dakota statute provided that policies of hail insurance should take effect within twenty-four hours from the time when an application is received by any authorized agent unless within that time the agent and the applicant are notified to the contrary by the company. This was sustained in *National Union Fire Insurance Company* v. *Wanberg*[35] in an opinion by Mr. Chief Justice Taft which points out that it does not, as the company erroneously contended, force a contract upon the company against its will, since the company need not hold itself out to

[34] Appelby v. New York, note 18, *supra;* Appelby v. Delaney, note 19, *supra.*

[35] 260 U. S. 71, 43 Sup. Ct. 32 (1922), discussed in Carl W. Funk, *The Duty of an Insurer to Act Promptly on Applications,* 75 U. PA. L. REV. 207; and a note in 32 YALE L. J. 413, referring to notes on the case in the court below, in 19 MICH. L. REV. 340 and 5 MINN. L. REV. 224.

offer this kind of insurance, and need not accept an application, but may arrange its business methods so as to pass on every application within the limit designated. A review of meteorological phenomena in North Dakota convinced the court that there was a public interest in prompt action upon applications for hail insurance. The Chief Justice conceded that this statute went close to the limit of police power but he found that it did not go beyond. The application in issue specified that no policy should take effect until the company's Minnesota agency had opportunity to accept the application, but the invalidity of this provision under the terms of the statute was said to be reasonably necessary to make the statute effective. In the course of the opinion the Chief Justice points out that insurance is established to be "a business affected with a public interest," and that it is not important that this statute may bear more heavily on extra-state companies with remote home offices, since this is necessarily incident to their doing business in other states and since also they are not entitled to identical treatment with domestic corporations.[36]

A New York statute requires companies issuing automobile liability policies in the state to insert in the policy a clause providing that the insolvency or bankruptcy of the insured shall not release the insurer from liability and that in case an execution against the insured in a suit by a person injured is returned un-

[36] On regulation of insurance companies and insurance contracts, see Samuel Becker, *The Administrative Control of Insurance in Wisconsin*, 4 WIS. L. REV. 129; Joseph P. Chamberlain, *Insurance for the Benefit of Third Persons under Statute*, 11 A. B. A. JOUR. 84; Thomas I. Parkinson, *Statutes Exempting Life Insurance Proceeds from Creditors*, 9 A. B. A. JOUR. 112; Edwin W. Patterson, *Some Problems in the Licensing of Insurance Companies*, 23 COLUM. L. REV. 536; *Administrative Control of Insurance Policy Forms*, 25 COLUM. L. REV. 253; and *The Formation of Insurance Companies*, 74 U. PA. L. REV. 20; Sterling Pierson, *Recent Legislation Relative to Business Insurance*, 14 A. B. A. JOUR. 139; *The Legislatures Expand the Group Insurance Field*, 15 A. B. A. JOUR. 407; and *Recent Legislation Preserving Insurance Proceeds for Beneficiaries*, 16 A. B. A. JOUR. 23; and notes in 27 MICH. L. REV. 558, on delegation to insurance commissioner of power to disapprove provisions in standard policy; in 3 TEMP. L. Q. 411, on requiring defunct insurance company to deposit funds with state officer; and in 15 IOWA L. REV. 389, on requiring notes given for insurance to state fact on their face.

satisfied on account of the insolvency or bankruptcy of the insured, an action may be maintained by the injured person against the company under the terms of the policy for the amount of the judgment not exceeding the amount of the policy. Such a suit by the injured person against the company was sustained in *Merchants' Mutual Automobile Liability Insurance Co.* v. *Smart* [37] against the complaint that the compulsory inclusion of such a provision in the policy is a taking of the liberty and property of the company without due process of law. Mr. Chief Justice Taft, after telling something about automobile liability insurance, goes on to say:

> "* * * Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy." [38]

Another reason found for the legislation was that it provides a safeguard against collusion between the insured and the insurer whereby the former might be adjudicated a bankrupt and thus defeat recovery on the policy because he suffers no loss. After holding the requirement of the statute a reasonable one, the Chief Justice reminded the company that if it does not like the prescribed policy it need not issue it, since "it need not engage in such insurance if it chooses not to do so."

A statute of Missouri authorizing the state superintendent of insurance to order reduction of the rates of insurance companies upon finding that for the past five years there has been for the stock fire insurance companies doing business in the state an ag-

[37] 267 U. S. 126, 45 Sup. Ct. 320 (1925).
[38] 267 U. S. 126, 129-130 (1925).

gregate profit in excess of what is reasonable came before the court in *Aetna Insurance Co.* v. *Hyde* [39] in a proceeding which did not contest the constitutionality of the statute but urged that the superintendent had estimated profits on an erroneous basis and had therefore issued an order which infringed the Fourteenth Amendment. For a unanimous court Mr. Justice Butler declares that no constitutional issue is raised by a complaint confined to the effect of the rates on the aggregate business of all the companies. The issue of confiscation, he observes, is individual to each company. One cannot object to rates compensatory to itself because they are not compensatory to others. The decision makes it clear that the canons for rate regulation set forth in the statute afford no test of the constitutionality of rates fixed under them, but it does not involve the issue whether there could be constitutional objection to the use of such canons, since no such objection was urged. It may perhaps be inferred from the opinion that rates fixed by inappropriate canons or by no canons may still be good if their result to any complaining company is not confiscatory under appropriate constitutional tests.

After the decision in the preceding case, the superintendent of insurance designated the classes of risks to which the reductions approved by the state court should be applied. The companies then individually brought bills to enjoin the order and alleged the unconstitutionality of the order and of the statute. The district court denied the requested interlocutory injunction for the reason that the companies had failed to refund to customers the excess rates charged by them in accordance with a stipulation entered into with the state superintendent in the earlier proceedings. In *National Fire Insurance Co.* v. *Thompson* [40] Mr. Justice Butler examined the stipulation and found that it obligated the companies to restore the excess collected by them in case the rates fixed by the superintendent were sustained in the proceed-

[39] 275 U. S. 440, 48 Sup. Ct. 174 (1928). The case in the court below is considered in 41 HARV. L. REV. 532 and 15 ST. LOUIS L. REV. 400. On similar issues, see Earl C. Arnold, *The Power of the State to Regulate Rates Charged by Insurance Companies,* 28 MICH. L. REV. 530; and notes in 12 ST. LOUIS L. REV. 66, on regulating insurance rates, and in 5 WIS. L. REV. 111, on delegation to insurance commissioner of power to fix rates.

[40] 281 U. S. 331, 50 Sup. Ct. 288 (1930).

ings to which the stipulation applied. Therefore the lower court was justified in applying the prerequisite of clean hands and in withholding equitable intervention until the complainants lived up to their prior engagement.

A statute of Oregon which required an annual license fee of $500 for every duly appointed agent of a fire insurance company in excess of one to each town or city, with the exception of cities having more than fifty thousand population, in which two agents were to be allowed upon payment of the normal two dollar fee, came before the court in *Herbring* v. *Lee* [41] in a proceeding to which the insurance company was not a party and in which there was no assignment of error raising any rights of the company. The rights of the company were therefore not considered. Mr. Justice Sanford declared that the rights of the agent are dependent upon the rights of the company, and that the contention that the statute is an unconstitutional interference with the individual rights of the would-be agent is without merit.[42]

The established rule that a state law regulating the incidents of an insurance policy cannot apply to a policy issued under the laws of another state, even as a condition on doing business in the would-be regulating state, finds illustration in *Aetna Life Insurance Co.* v. *Dunken* [43] in which the inquiry dealt largely with the issue whether the policy was a new Texas policy or a continuation of a former Tennessee policy. The first policy was a term policy with a provision entitling the assured to a life policy upon his application within the designated period. The later life

[41] 280 U. S. 111, 50 Sup Ct. 49 (1929). In 34 YALE L. J. 442, is a note on a case in the Washington court holding unconstitutional a similar statute of the state of Washington.

[42] During the October Term of 1930, over the dissent of Justices Van Devanter, McReynolds, Sutherland and Butler, the new Supreme Court in O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931), sustained a statute of New Jersey forbidding insurance companies to pay to any local agent higher commissions than those allowed to other local agents in the state on similar risks.

In 8 TEX. L. REV. 302, is a note on agreements between insurance companies to limit agents' commissions.

On other insurance agreements, see William H. Watkins, *The Fire Insurance Anti-Trust Suit in Mississippi,* 13 VA. L. REV. 108.

[43] 266 U. S. 389, 45 Sup. Ct. 129 (1924), discussed in 38 HARV. L. REV. 804, 826; 20 ILL. L. REV. 72, 822; and 3 TEX. L. REV. 286.

policy was declared by Mr. Justice Sutherland to be one "issued not as the result of any new negotiation or agreement but in discharge of pre-existing obligations." Therefore it was held to follow the status of its predecessor. The earlier policy was concededly a Tennessee contract, made when the insured lived in Tennessee. He lived in Texas when the life policy was issued; he died in Texas, and the Texas court applied a Texas statute and awarded a penalty and counsel fees in the suit on the policy. This was held to be an unconstitutional regulation of a Tennessee contract, without any inquiry as to whether it might be regarded as a procedural incident of a Texas lawsuit. It was assumed *sub silentio* that Texas gained nothing by her statute declaring that every contract of insurance payable to a citizen or inhabitant of Texas shall be held to be a Texas contract and that this provision, among others, is a condition upon which foreign companies shall be permitted to do business in Texas and to which they shall be deemed to consent as a precedent to the right to do business there. When the company issued the policy, it was doing business in Texas.

A statute of New Mexico which forbade insurance companies authorized to do business within the state to pay any fee to non-residents of the state for obtaining insurance covering risks within the state was declared unconstitutional in *Fidelity & Deposit Co.* v. *Tafoya*[44] on the ground that the state cannot apply its police power to acts outside its borders. It was urged on behalf of the state that the object of the statute was to prevent the employment of dummy agents within the state, but Mr. Justice Holmes said that it is impossible to limit the statute in such a way, without intimating whether such an interpretation could help the case. The action was a bill to enjoin the state officials from suspending the right to do business in the state, but as the threat to suspend was predicated solely upon the payment of commissions to non-resident agents, Mr. Justice Holmes applied the now more frequently favored canon that the state may not adduce an arbitrary general power to exclude for no reason as affording any sanction for a claimed power to exclude for a particular intrinsically unconstitutional reason. There was dissent

[44] 270 U. S. 426, 46 Sup. Ct. 331 (1926).

by Justices McReynolds, Brandeis and Sanford on the ground that the provision complained of was no longer in force and the case had therefore become moot, but Mr. Justice Holmes thought it possible that there might be suspension for past violations and that therefore there was jurisdiction. The later statute merely required that policies must be delivered to agents within the state who should receive the premium and collect the full commission, with authority to such agents to make arrangements with outside agents. The validity of this was not passed upon in the opinion.

No interference with the internal affairs of a foreign insurance company was found in *Hartford Life Insurance Co.* v. *Dowds*[45] which sustained an Ohio judgment against a Connecticut corporation for recovery of premiums paid in excess of the amount rightly demandable under the original contract. The judgment was predicated upon the Ohio contract and not upon any Ohio statute. The company contended that the suit involved interference with its internal management and was the exercise of a visitorial power which belonged only to the courts of Connecticut. The rejection of the contention was perhaps made easier by the fact that the Connecticut court had itself in other proceedings construed the contract as the Ohio court had here done, and had held further that courts of other states might render judgment for recovery of excess premiums paid.

An earlier decision that a state may not forbid persons to procure outside the state a contract of insurance covering property within the state was deemed a precedent for the holding in *St. Louis Cotton Compress Co.* v. *Arkansas*[46] that a state may not impose on the making of such an outside contract a tax of five per cent upon the premiums when the tax on premiums on policies issued by authorized companies within the state is only two per cent. That the statute was regarded as regulatory and prohibitory rather than fiscal is clear from the opinion of Mr. Justice Holmes:

"* * * The short question is whether this so-called tax

[45] 261 U. S. 476, 45 Sup. Ct. 409 (1923).

[46] 260 U. S. 346, 43 Sup. Ct. 125 (1922). An earlier state case on a similar statute is the subject of comment in 22 MICH. L. REV. 162.

is saved because of the name given to it by the statute when it has been decided in *Allgeyer* v. *Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon the doing of the act. The name given by the State to the imposition is not conclusive. * * * In Louisiana the detriment was $1,000. Here it is 5 per cent. upon the premiums—which is 3 per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that a state may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. * * *"[47]

The question whether the state was seeking to apply its police and taxing power to extraterritorial contracts of insurance arose again in *Palmetto Fire Insurance Co.* v. *Conn*[48] in which the sale within the state of an automobile which by such sale became covered by an insurance policy previously issued outside the state was held to subject the insurance contract to the state's jurisdiction. The Ohio statutes before the court, according to Mr. Justice Holmes, "forbid the insurance of property in the state except by a legally authorized agent, resident in Ohio, and tax the business lawfully done there." The case arose in a proceeding by an insurance company to enjoin the revocation of its license

[47] 260 U. S. 346, 348-349 (1922).

[48] 272 U. S. 295, 47 Sup. Ct. 88 (1926), considered in Nathan Greene, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHNS L. REV. 22; and notes in 41 HARV. L. REV. 390; 25 MICH. L. REV. 777, reprinted in 61 AMER. L. REV. 442; 1 U. CIN. L. REV. 79; 75 U. PA. L. REV. 273; and 36 YALE L. J. 419. On the issue in lower courts, see notes in 39 HARV. L. REV. 899; 74 U. PA. L. REV. 415, 491; and 35 YALE L. J. 989.

for non-compliance with the statute. The company was regularly doing business in Ohio, but Mr. Justice Holmes says that, if the transaction in question did not bring the company within the state's taxing power, "the power of the state to exclude the company altogether could not be used as a means to accomplish a result beyond the state's constitutional power." There is no suggestion in the opinion that the state might have a power to tax though devoid of a power to prohibit. The contracts in question are thus reported by Mr. Justice Holmes:

> "* * * The plaintiff made a contract of insurance in Michigan with the Chrysler Sales Corporation, a Michigan corporation which sells all the automobiles made by the Chrysler Corporation. This contract purported to insure purchasers of Chrysler cars against fire and theft, and to become automatically effective from the date on which the purchaser took delivery or a bill of sale of the car; the Chrysler Company to send a monthly report to the plaintiff of all cars for which insurance was thus provided and to pay premiums accordingly at Detroit. If any one bought a car he got the insurance whether he wished it or not as part of his bargain, and a certificate was sent to him by the plaintiff. * * *"[49]

This contract of insurance was evidently devised by one who was familiar with the *Allgeyer* case and the *Compress* case, but Mr. Justice Holmes does not mention those cases in his opinion. Without citation of any cases he contents himself with saying:

> "Manifestly there was nothing in the contract between the plaintiff and the Chrysler Sales Corporation, without more, that Ohio could lay hold of, even if it insured property in Ohio. But the contract contemplated and provided for a benefit to third persons if, when, and where they complied with its conditions. When a man bought a car in Ohio, by that act he made effective the agreement of the Company to insure future purchasers, and imposed upon it an obligation that did not exist before. It is true that the obligation arose from a contract made under the law of another state, but the act was done in Ohio and the capacity to do it came from the law of Ohio, so that the co-operation of that law was necessary to the obligation imposed. It would be held in some jurisdictions that the purchaser became party to the

[49] 272 U. S. 295, 304 (1926).

> contract with the insurance company. By universal consent he at least would become the beneficiary of a contract for his benefit. Whatever technical form may be given to the reasoning, the substance is that by acts done in Ohio the purchaser obtains for himself the advantage of insurance that before that moment did not exist. It does not matter whether his getting it was a large or an inconspicuous feature of his bargain. It was part of it in any event, and we cannot doubt that the lower Court was right in holding that in such circumstances the State could insist upon its right to tax. It would be extravagant to say that the State's general power to deny to the plaintiff the right to enter or remain within it for business unless it paid for these transactions as a part of the price, must be denied upon constitutional grounds." [50]

In two other cases suits were brought by distributors and dealers in cars to enjoin the revocation of their licenses to do business. From the briefs it appears that the insurance companies were not admitted to do business in those states. The insurance commissioner was threatening the dealers on the ground that the sales contravened the state statute. Apparently these other cases involved a police exertion of the state. In sustaining the denial of the injunction against the threats of the state authorities, Mr. Justice Holmes says:

> "* * * The question raised by these bills is the general one, whether the State laws can be applied to this insurance. That we have answered. Exactly how far the laws can go and what proceedings can or cannot be taken, may be left to be determined, if the questions arise, in the State Courts." [51]

Because of the interrelation between the cases on taxation of insurance policies and cases on police regulations of them when the issue is whether the state has sought to wield power over matters outside its borders, attention should be paid here to the darkness which may be shed upon the differentiations in the mind of the court by *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*.[52] This involved a tax imposed

[50] *Ibid.*, 304-305 (1926).

[51] *Ibid.*, 306 (1926).

[52] 275 U. S. 87, 48 Sup. Ct. 100 (1928), discussed in 41 HARV. L. REV. 390 and 26 MICH. L. REV. 803.

on insurers who take out policies outside the jurisdiction covering property within the jurisdiction. The tax was the same percentage of the premiums as that imposed on policies issued within the jurisdiction by authorized companies. Two different situations were involved. In the first the Philippine branch of a Spanish corporation notified the home office in Spain when a shipment was sent from the Philippines and the home office thereupon took out a marine policy with a French company not doing business in the Philippines. On these policies the Spanish corporation was held to be immune from taxation. The majority of the court through Mr. Chief Justice Taft refused to distinguish the *Compress* case on the notion that the imposition there was a penalty rather than a fiscal exaction. It differentiated another case in which a tax on an insurance company was measured by premiums on policies on lives within the state even though the policies were taken out and the premiums paid in another state, by pointing out that in that case the company was doing business in the taxing state and would be obliged to attend to matters within the state in settling policies on the lives of residents. It refused to accept as the basis of the earlier decision the fact that the taxing state gave protection to the lives of assured within the state and pointed out that this was only one of the co-operating grounds of the decision. To recognize such protection of the assured as a sufficient basis for taxation of policies would require the overruling of the *Compress* case, for the policies there held immune were on property within the state. Justices Holmes and Brandeis in dissenting confined themselves to the distinction between a normal tax and a discouraging penalty. Apparently they as well as the majority agree that a state could not prohibit the making of such contracts as were involved in the *Allgeyer* and *Compress* cases and the marine policies in the case at bar.

The second class of policies were fire policies on goods in the Philippines taken out by the Spanish corporation in Spain or England with an English company that was doing business in the Philippines. In sustaining a tax on the assured for the premiums paid on such policies, the Chief Justice said:

"We come now to the question of the tax upon the premiums

paid to the London Company, which was licensed and presumably was doing business in the Philippine Islands. Does the fact that, while the Tobacco Company and the London Company were within the jurisdiction of the Philippines, they made a contract outside of the Philippines for the insurance of merchandise in the Philippines, prevent the imposition upon the assured of a tax of one per cent. upon the money paid by it as a premium to the London Company? We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment, and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Society* v. *Commonwealth of Pennsylvania,* 238 U. S. 143. The case is a close one, but in deference to the conclusion we reached in the latter case, we affirm the judgment of the court below in respect to the tax upon the premium paid to the London Company." [53]

The presence of the property in the taxing jurisdiction cannot alone be a reason for sustaining the tax, because the situation of the property was the same in the *Compress* case. In that case, however, the company was not doing business in the taxing state and so could not be compelled to undertake acts of settlement within the state. Thus it seems that something clearly depends upon the fact that the insurance company is licensed to do business in the taxing state. The question occurs whether in addition to this it is important that the property be permanently within the taxing state. What would have been the result if the marine policy on goods bidding farewell to the jurisdiction had been issued outside the jurisdiction by a company admitted to do business within the jurisdiction? This question, the conglomeration of the cases does not yet answer. A further question relates to the possibility of distinction between cases of taxation and prohibition. Clearly enough, the state may not pro-

[53] 275 U. S. 87, 98-99 (1928).

hibit where it may not tax. The majority in denying the power to tax say that it is no greater than the power to prohibit and penalize. They say this, however, to adduce the support of a case denying power to penalize. Would they find a case where a normal tax would be permitted but where prohibition would not be? The kaleidoscope must turn again before we can safely answer.[54]

The question whether a policy of insurance was so issued as to constitute the making of a contract within the state arose in *Minnesota Commercial Men's Association* v. *Benn*[55] through an effort to subject the foreign corporation to the jurisdiction of the court by service on the secretary of state on the assumption that the corporation was doing business there. The only events within the state were the acts of local members of the mutual society in seeking to procure applications from others and the subsequent mailing of applications by those responsive to the suggestion. This solicitation by members not authorized to obligate the company in any way was declared by Mr. Justice McReynolds not to amount to doing business within the state. Nor is the company doing business in a state "merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes, and pays losses by checks from its own office."

On the other hand, solicitation within the state by agents au-

[54] In 14 CORNELL L. Q. 481 is a discussion of the question whether New York may apply to foreign insurance policies its statute as to liability of life insurance policies for debts.

[55] 261 U. S. 140, 43 Sup. Ct. 292 (1925).

A Texas statute provided that "no person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement by reason whereof the time in which to sue thereon is limited to a shorter period than two years" and added that "no stipulation, contract, or agreement for any shorter limitation in which to sue shall ever be valid in this state." A Texas court applied this statute to allow suit on a Mexican policy of insurance which provided that no suit on any claim under the policy shall be brought in any tribunal, "unless such suits or demands are filed within one year counted as from the date on which such damage occurs." This was reversed in Home Insurance Co. v. Dick, 281 U. S. 397, 50 Sup. Ct. 338 (1930), in which Mr. Justice Brandeis declared that the Texas statute is not simply one of limitation but one that prohibits the making of certain contracts, and that as applied to the case at bar, one that directs the disregard in Texas of contractual rights and obligations wherever created.

thorized by the company was held in *Bothwell* v. *Buckbee, Mears Co.*[56] to constitute the doing of business therein so as to warrant exclusion from the courts of the state of suits brought with respect to such business by the unregistered foreign corporation or its receiver. The agent who solicited the business furnished blanks which the persuaded listener filled in and sent by mail with check for the first premium to the home office of the company outside the state where the company signed the policy and sent it by mail to the thus insured. In commenting on the situation, Mr. Justice Brandeis said:

> "* * * The parties had, under the *Allgeyer* and *Cotton Compress* cases, the constitutional right to make in Maryland a contract of insurance despite a prohibition of the Minnesota law. But the Company, a foreign corporation, had no constitutional right to solicit the insurance in Minnesota by means of an agent present within that State. For the act of solicitation there the State might have punished the agent; and also the Company as principal. * * * As the contract was not a later independent act, but grew immediately out of the illegal solicitation, and was part of the same transaction, being inseparably tied to it by the use of the application blank illegally distributed, the contract was tainted with the illegality. * * * Because of such taint the State, under rules of general application, would have had the right to refuse to enforce it, although made in Maryland, even if it had been wholly unobjectionable in its provisions. * * *"[57]

The particular contract was found to be obnoxious to the Min nesota law because it bound the insurance company to do acts in Minnesota lawfully open only to companies duly admitted to do business there. The policy was one for "strike insurance", and the company agreed to defend the assured in any legal proceedings brought against it by striking employees. Such defense in the particular case would necessarily take place in Minnesota because the assured was a Minnesota corporation with no place of business outside that state. The further undertaking of the company to indemnify the assured for losses from strikes did

[56] 275 U. S. 274, 48 Sup. Ct. 124 (1927), considered in 3 NOTRE DAME LAW. 145.

[57] 275 U. S. 274, 277 (1927).

not specify the place of payment and therefore under the common-law rule imposed the obligation to pay in Minnesota, the domicil of the assured. In addition to these positive undertakings, the company reserved to itself the right to do various acts in Minnesota, such as to inspect the plant and books and papers of the assured and to make inquiries of persons connected with the business. These were activities in Minnesota lawfully forbidden to companies not registered there. Therefore the state was justified in closing its courts to this company seeking to recover therein assessments on such a policy, because "under rules of law generally applicable a state may refuse to enforce a contract which provides for doing within it an act prohibited by its laws." A further question whether the receiver might not have greater rights than the company itself was left unconsidered because not duly set up in the state court.

An issue as to the choice between the usury statute of one state and the usury statute of another state arose in *Seeman* v. *Philadelphia Warehouse Co.*[58] in a case begun in the federal district court, and was apparently decided as a common-law question of conflict of laws. The situation suggests, however, interesting problems of constitutional law. The action was one for conversion of salmon by a vendee from a pledgeor who had

[58] 274 U. S. 403, 47 Sup. Ct. 626 (1927).

Questions of usury and of rates of interest are considered in William Tristram Coffin, *Usury in California,* 16 CALIF. L. REV. 281, 387; Walter S. Hilborn, *The Small Loan Act,* 14 A. B. A. JOUR. 581; Raymond B. McConologue, *Usury,* 1 So. CALIF. L. REV. 253; and notes on interpretation of usury laws, in 16 CALIF. L. REV. 553; 24 COLUM. L. REV. 934; 25 COLUM. L. REV. 801; 7 No. CAR. L. REV. 332; 2 So. CALIF. L. REV. 195; and 37 YALE L. J. 829; on enjoining repeated violation of usury laws, in 18 CALIF. L. REV. 328; 30 COLUM. L. REV. 125; 43 HARV. L. REV. 499; 28 MICH. L. REV. 939; 14 MINN. L. REV. 690; and 39 YALE L. J. 590; on status of Kentucky usury law, in 18 KY. L. J. 374; on effect of state and national banking acts on usury laws of New York, in 29 COLUM. L. REV. 977; on usury and the conflict of laws, in 14 VA. L. REV. 570; on question when mortgage is usurious, in 41 HARV. L. REV. 405; on methods of avoiding usury statute, in 18 KY. L. J. 401; on issue of usury in alleged forbearance in conditional sales of automobiles, in 2 So. CALIF. L. REV. 502; on commission exacted for securing loan, in 14 MINN. L. REV. 195 and 34 W. VA. L. Q. 217; on credit sale at price in excess of cash sale, in 1 So. CALIF. L. REV. 304 and 39 YALE L. J. 408; and on the uniform small loan law, in 23 COLUM. L. REV. 484; 42 HARV. L. REV. 689; and 4 NOTRE DAME LAW. 130.

wrongfully regained possession from the pledgee. The pledge was to secure a loan usurious under the law of New York and void, usurious also under the law of Pennsylvania but not void. The district court had applied the New York law and held the loan void. This was reversed by the circuit court of appeals. It was disputed in the Supreme Court whether the loan was made in Pennsylvania or in New York, but the issue was not decided, because Pennsylvania was concededly the place of performance and Mr. Justice Stone applied the Supreme Court doctrine that parties may lawfully contract for a rate of interest valid either by the law of the place of making or by that of the place of performance. The circuit court of appeals was sustained in applying the more favorable Pennsylvania rule which did not invalidate the transaction. The possibility of constitutional issues arising out of such a situation may be imagined by assuming action begun in either the Pennsylvania or the New York court. Suppose New York should hold that the contract was made in New York and that the New York statute governed. By the analogy of the insurance cases, the Supreme Court should hold that this raises an issue under the Fourteenth Amendment whether the New York statute had been applied extraterritorially. The New York court should be reversed if the Supreme Court found that New York was neither the place of making nor the place of performance. Suppose, however, the Supreme Court found that New York was the place of making. Would it hold that it was an extraterritorial application of the New York statute for the New York court to decline to recognize the conflict-of-laws doctrine of the Supreme Court by which the more favorable law of the place of performance may be allowed to govern? Is the Supreme Court preference for the amphibious conflicts rule a sign of a canon of constitutional law that a state court cannot apply a statute of that state to declare invalid for usury a contract made there but to be performed in another state in which the law of usury is more clement to the lender? Other questions would arise if action were brought in the state court of Pennsylvania. If that court applied the Pennsylvania statute as the law of the place of performance when that law is more favorable to the contract, the Supreme

Court could hardly say that the application by the state court of the preferred conflicts rule of the Supreme Court is an offense against the Fourteenth Amendment. But suppose the Pennsylvania court applies the New York statute because of its preference for the law of the place of making. Does this raise a constitutional issue? The question can be put more simply if it were agreed that the contract was made and to be performed in the same state, but there is dispute as to whether this state is New York or Pennsylvania. If suit is in New York and the New York court applies the New York statute, the Supreme Court will clearly take jurisdiction and reverse if it finds that the contract is indigenous to Pennsylvania rather than to New York. But would the result be the same if the Pennsylvania court applied a New York statute to a situation which the Supreme Court would think properly subject only to the Pennsylvania statute? If it raises a constitutional issue when Missouri wrongfully applies a Missouri statute to a New York contract, it would seem to raise the same issue when the New York court does the same thing. Another possibility is that a Kansas court might have to decide whether a contract should be governed by a Massachusetts statute or a Vermont statute. Would this raise an issue under the Federal Constitution? There are plenty of cases holding it an offense against the Fourteenth Amendment for a state court to give extraterritorial application to a statute of the jurisdiction to which it belongs, but most if not all of these other questions seem to be ones still awaiting official answer.[59]

[59] Various regulations of the sale of investment securities are discussed in Forrest Bee Ashby, *The Operation of Blue Sky Laws,* 1 TEMP. L. Q. 103; Montreville J. Brown, *Review of the Cases on "Blue Sky" Legislation,* 7 MINN. L. REV. 431; G. S. Canright, *Regulation of the Sale of Securities, with Reference to Wisconsin Statutes,* 8 MARQ. L. REV. 134; Leland S. Duxbury, *Business Trusts and Blue Sky Laws,* 8 MINN. L. REV. 465; J. Edward Meeker, *Preventive v. Punitive Security Laws,* 26 COLUM. L. REV. 318; H. S. Richards, *Watered Stock and Blue Sky Legislation,* 2 WIS. L. REV. 1, 86; and notes on blue sky laws, in 24 COLUM. L. REV. 79; on interpretation of Minnesota blue sky law, in 7 MINN. L. REV. 61; on application of blue sky law to contract for sale of land, in 37 YALE L. J. 123; on whether there may be recovery for sales of stock in violation of blue sky law, in 18 CALIF. L. REV. 149; 35 YALE L. J. 881; and 37 YALE L. J. 824; on delegation of power in Blue Sky Laws, in 4 NEB. L. BUL. 354 and 3 WIS. L. REV. 421;

A statute of New York confining to corporations certain described businesses akin to banking, and including the receiving of deposits in instalments for co-operative, mutual loan, savings or investment purposes in sums of less than $500 each, was sustained in *Dillingham* v. *McLaughlin*[60] against the complaint of an individual whose plan of operations involved receipt of monthly instalments with complete forfeiture to investors who do not complete five instalments, with return of less than the amounts paid by those who do not pay to the end of their instalment contract, with a chance for a share of the profits for those who are faithful to the end, and with a right to borrow at three per cent. on an approved first mortgage of real estate for those who have paid ten per cent. of their total undertaking unless the fund in a segregated series has already been fully borrowed by prior applicants. Mr. Justice Holmes described some possible disappointments of small investors, but said that the statute is not aimed at gaming, but "is a regulation of a business so far akin to banking as to be at least equally clothed with a public interest, and subject to regulation." Since regular banking may be confined to corporations, this business may be. The complaint of discrimination in that the statute was confined to the business of receiving deposits under $500 was answered by saying:

> "* * * The small sums generally come from people without much knowledge of such affairs. Whatever may be one's own opinion about the wisdom of trying to save the ignorant and rash from folly, it is a recognized power that is used in many ways. We have adverted to the element of

on application of blue sky law to successive sales by owner, in 10 MINN. L. REV. 341; on "Middle West Blue Sky Legislation", in 1 DAK. L. REV. 138; and on the Martin Fraud Law in New York, in 25 COLUM. L. REV. 957.

On other questions arising out of investments or dealings in money, see John Sherman Myers, *Fixed Investment Trusts—Some Observations*, 4 ST. JOHNS L. REV. 1; and notes in 14 ST. LOUIS L. REV. 194, on building and loan associations; in 11 MINN. L. REV. 380, on what is a lottery; in 2 DAK. L. REV. 493, on worthless check acts; in 12 ST. LOUIS L. REV. 196, on "The State's Priority under Depository Laws"; in 16 VA. L. REV. 315 and 34 YALE L. J. 202, on restricting assignments of salary; in 12 MINN. L. REV. 285, on regulating joint deposits; and in 29 COLUM. L. REV. 206, on uniform written obligations act.

[60] 264 U. S. 370, 44 Sup. Ct. 362 (1924).

> chance in this very undertaking, because it is one not likely to be realized by an applicant. This and the long delay and loss that may ensue upon any particular deposit, would be sufficient warrant for the State's effort at least to bring such business under supervision and control, if not to prevent it altogether. * * * " [61]

Against the complaint of a savings bank, a California statute providing for the escheat to the state of savings deposits after twenty years of quiescence was sustained in *Security Savings Bank* v. *California.*[62] As the substantive power to enforce such escheat had been established by previous decision, the opinion of Mr. Justice Brandeis concerns itself chiefly with procedural objections urged by the bank. These were directed to the point that the unknown and possibly non-resident depositors were not given adequate notice so that their claims against the bank would be cut off by the proceedings. Mr. Justice Brandeis laid down that, whether the proceedings were to be regarded as *in rem* or only *quasi in rem* so far as depositors are concerned, the only essentials of jurisdiction are that there be seizure of the *res* at the commencement of the suit and reasonable notice and opportunity to be heard. Personal service upon the bank in a suit by the attorney general was said to constitute seizure or its equivalent. Publication for four weeks in a paper of general circula-

[61] 264 U. S. 370, 374 (1924).

A Missouri statute declaring that "no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house" was held in First National Bank v. Missouri, 263 U. S. 640, 44 Sup. Ct. 213 (1924), to be under existing federal statutes applicable to a national bank. A dissenting opinion by Mr. Justice Van Devanter, concurred in by Mr. Chief Justice Taft and Mr. Justice Butler, confined itself to the issue of interference with a federal instrumentality, and it seemed to be unquestioned that the statute is constitutionally applicable to state banks.

Powers over banks are discussed in A. B. Butts, *State Regulation of Banking by Guaranty of Deposits,* 2 MISS. L. REV. 208; Wallace Hawkins, *Guaranteed Deposits under Depositors' Guarantee Fund,* 3 TEX. L. REV. 152; Frank Edward Horack, *The Banking Clauses in the Constitution of Iowa,* 13 IOWA L. REV. 293; and notees in 14 IOWA L. REV. 511, on Iowa bank legislation; in 15 CALIF. L. REV. 408, on delegation to administrative officer of power to permit branch banks; in 32 YALE L. J. 82, on whether one is a "depositor" under the bank guarantee law; and in 14 MINN. L. REV. 553, on authorizing reorganization of bank without notice to depositors.

[62] 263 U. S. 282, 44 Sup. Ct. 108 (1923), discussed in notes in 4 BOST. U. L. REV. 205 and 9 ST. LOUIS L. REV. 149.

tion in Sacramento County was said to be sufficient notice to unknown depositors. Selection of the single county was held appropriate since other statutes required publication of quiescent deposits annually in the county where the bank is situated. Parties who did not appear had five years in which to reclaim deposits taken over by the state. In reply to more immediate objections of the banks against being compelled to yield the deposits, Mr. Justice Brandeis pointed out that they constitute contracts made and to be performed within the state and are therefore "intangible property within the state" over which the state has the same dominion as over tangible property. "The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or by some other person duly authorized. If the deposit is turned over to the state, in obedience to a valid law, the obligation of the bank to the depositor is discharged. * * * It is no concern of the bank's whether the state receives the money merely as depository or takes it as an escheat " [63]

In order to relieve state banks from the common-law duty to pay in cash over the counter all checks drawn by depositors upon them, North Carolina passed a statute permitting payment in exchange drawn on reserve deposits in other banks unless the drawer of the check should direct otherwise. This permission was confined to checks presented for payment by or through any Federal Reserve bank, post office or express company. The object of the statute was to secure to the state banks the power to collect exchange on checks drawn on them and presented to other banks for payment. In order to promote universal collection of checks at par, the banks in the Federal Reserve system had developed a plan of collecting checks from banks outside the system and presenting them for payment over the counter of the drawee bank, thus compelling them to retain unprofitable cash resources in their own vaults, hoping thereby to coerce the outside banks to consent to remit at par for all checks drawn upon them. With the banks relieved of the obligation to pay in cash over the

[63] 263 U. S. 282, 286 (1923).

counter, the Federal Reserve banks would lose this instrument of coercion. It was hoped that they would then cease to make collection on checks drawn on banks outside the system and that those banks would thus be able to charge exchange for remitting in drafts drawn on reserve deposits and would be relieved of the necessity of keeping on hand large amounts of idle money. The issue as to the constitutionality of the statute came before the Supreme Court in *Farmers and Merchants' Bank* v. *Federal Reserve Bank*[64] in an action brought by a local bank to enjoin a Federal Reserve bank from returning as dishonored the checks presented to country banks which the country bank offered to pay by an exchange draft but refused to pay in cash. The contention that the statute violated the constitutional provision forbidding the states to make anything but gold and silver a legal tender in payment of debts was rejected as clearly unfounded. The debt of the bank is solely to the depositor. The statute does not require payment in an exchange draft but merely provides that the depositor shall be assumed to have consented to such form of payment if he does not indicate otherwise. As the statute is purely prospective, there is no constitutional objection to presuming consent in the absence of indicated dissent. The due-process complaint against the statute was that it deprived the collecting bank of liberty of contract in compelling it to accept exchange drafts whether good or bad. To this Mr. Justice Brandeis answered that it would not be assumed that the statute authorized payment in bad drafts. It must be assumed that it authorizes only such drafts as are customarily used in remitting for checks. "So construed", he added, "the statute is merely an exercise of the police power, by which the banking business is regulated for the purpose of protecting the public, and promoting the general welfare." To the equal-protection complaint he answered that checks presented by mail or express

[64] 262 U. S. 649, 43 Sup. Ct. 651 (1923), discussed in 37 HARV. L. REV. 133, 149. For common-law litigation arising out of the situation prompting the legislation sustained in this case, see American Bank & Trust Co. v. Federal Reserve Bank, 256 U. S. 350, 41 Sup. Ct. 499 (1921), and American Bank and Trust Co. v. Federal Reserve Bank, 262 U. S. 643, 43 Sup. Ct. 649 (1923). The situation is discussed in Sterling Pierson, *Legislation Relating to Problems of Check Collection,* 14 A. B. A. JOUR. 406.

or by or through Federal Reserve banks had afforded occasion for the special dangers which the statute was designed to meet, and it was therefore proper for the legislation to confine itself to the already realized menace. The statute was also sustained as not in conflict with the Federal Reserve Act.

Statutes imposing liabilities upon officers and stockholders of financial institutions present issues to be reviewed in detail in a succeeding section dealing with liabilities. In two cases stockholders unsuccessfully contested the procedure provided for enforcing assessments on bank stock. *Toombs* v. *Citizens Bank*[65] involved an assessment voluntarily levied by the officers of the bank as a way of escape from liquidation and assessment by state agency. The complaint was that the statute failed to require notice to the stockholder. It required the directors to "call a meeting", and did not dispense with notice. The court declined to construe it as authorizing the assessment without notice.

In *Coffin Brothers & Co.* v. *Bennett*[66] assessment proceedings were begun by issue of an execution by the superintendent of banks, and the execution was made a lien on all property of the stockholder subject to levy and sale. Subsequent to the execution, the stockholder might by "affidavit of illegality" contest his liability for the assessment and have the matter determined in judicial proceedings. This was held to give him a reasonable opportunity to be heard and to make defense, since the Fourteenth Amendment is concerned with substance and not with the form.[67]

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[65] 281 U. S. 643, 50 Sup. Ct. 431 (1930). Stockholders' liability is discussed in notes in 8 No. CAR. L. REV. 285, on liability of stockholders in insolvent state banks; in 13 VA. L. REV. 127, on administrative finality of amount of assessments to enforce statutory liability of shareholders of bank; and in 13 VA. L. REV. 237, on extraterritorial enforcement of corporate shareholders' statutory liability.

[66] 277 U. S. 29, 48 Sup. Ct. 422 (1928).

[67] Various aspects of corporate financing are considered in Forrest B. Ashby, *The Influence of Securities Regulation upon Standards of Corporation Financing,* 26 MICH. L. REV. 880; Henry W. Ballantine, *Changes in the Corporate Securities Act,* 17 CALIF. L. REV. 536; Lionel B. Benas, *The Corporate Securities Act: Recent Cases and Amendments,* 14 CALIF. L. REV. 101; Milton M. Bergerman, *Voting Trusts and Non-voting Stock,* 37 YALE L. J. 445; A. A. Berle, Jr., *Investors and the Revised Delaware Corporation Act,* 29 COLUM. L. REV. 563; Minor Bronaugh, *Corporate Shares without*

Ferry v. *Ramsey*[68] involved the liability of a director of a bank for deposits received while it was insolvent. In form the liability was predicated upon assent to the receipt of the deposit with knowledge that the bank was insolvent. Failure to inquire into the condition of the bank was, however, declared to be equivalent to knowledge of insolvency, and the fact of the receipt of the deposit while the bank was insolvent was by the statute made *prima facie* evidence of knowledge of insolvency and assent to receipt of the deposit. This statute was applied in the case of a director too ill to have much if any actual knowledge of the condition of the bank and the receipt of deposits. Mr. Justice Holmes places the decision on the ground that the director might have been made absolutely liable, and that the statute merely chose a round-about method of doing somewhat less than it might. Mr. Justice Sutherland, in dissenting, thought that the propriety of the presumptions should be tested by what the state purported to be doing and not by what it might have done, and Justices Butler and Sanford agreed with him.[69]

The only cases in this section in which statutes were declared

Par Value, 26 LAW NOTES 87; John E. Dalton, *The California Corporate Securities Act,* 18 CALIF. L. REV. 115, 255, 373; Nathan Isaacs, *The Promotor —A Legislative Problem,* 38 HARV. L. REV. 887; David E. Lilienthal, *The Regulation of Public Utility Holding Companies,* 29 COLUM. L. REV. 404; Maxwell S. Mattuck, *Federal and State Prohibition against the Issuance of False Financial Statements,* 4 ST. JOHNS L. REV. 59; Francis J. Putman, *State Interference, Under the Reservation Clause, with Contracts Between the Stockholders of Corporations,* 7 N. Y. UNIV. L. REV. 487; Irwin S. Rosenbaum, *Regulation of Security Issues by the Ohio Public Utilities Commission,* 4 U. CIN. L. REV. 321; Joseph L. Weiner, *Theory of Anglo-American Dividend Law: American Statutes and Cases,* 29 COLUM. L. REV. 461; and notes in 10 MINN. L. REV. 235, 253, and 2 WASH. L. REV. 33, on constitutionality of no-par stock statutes; in 38 YALE L. J. 685, on power of commission to control issuance of shares by foreign corporations; in 11 CORNELL L. Q. 230, on preferred cumulative stock; in 3 WIS. L. REV. 442, on promoters' liability; and in 43 HARV. L. REV. 656; 14 MINN. L. REV. 413; and 16 VA. L. REV. 282, on abolition of sinking fund for redemption of preferred stock.

[68] 277 U. S. 88, 48 Sup. Ct. 443 (1928).

[69] A statutory presumption that "every insolvency of a bank shall be deemed fraudulent," put forth as a basis for holding the officers criminally liable unless they could show that the affairs of the bank were managed legally and diligently, was declared unconstitutional in Manley v. Georgia, 279 U. S. 1, 49 Sup. Ct. 215 (1929).

unconstitutional or were denied application to a particular situation are those in which there was found to be an extraterritorial regulation of insurance contracts. Three of these cases arose under statutes regulating rights of action, and turned on issues not peculiar to insurance contracts.[70] The other three involved statutes explicitly designed to regulate or to tax conduct outside the territorial jurisdiction. *Fidelity & Deposit Co.* v. *Tafoya*[71] annulled a statute forbidding companies admitted to the state to pay fees to non-resident agents for writing policies covering risks within the state. *St. Louis Cotton Compress Co.* v. *Arkansas*[72] saved insurers from a discouraging penalty for obtaining outside the state a policy of insurance on property within the state from a company not admitted to the state. *Compania General de Tobacos de Filipinas* v. *Collector of Internal Revenue*[73] involved a similar situation and visited the same condemnation on a tax on insurers that was at the same rate as that imposed on companies doing business in the state. In this case there was dissent by Justices Holmes and Brandeis, but this was confined to an expression of their approval of a tax and apparently would not extend to condonation of police prohibition and regulation. The only other dissents in cases in this section were on an issue of the jurisdiction of the federal courts[74] and on the propriety of a presumption of knowledge and assent on the part of a bank director.[75]

This case from the Philippines[76] was decided on the basis of the due-process provision in the Philippine Organic Act. Ap-

[70] Aetna Life Insurance Co. v. Dunken, note 43, *supra;* Minnesota Commercial Men's Association v. Benn, note 55, *supra;* Home Insurance Co. v. Dick, note 55, *supra.* In the Aetna Life Case, the provision as to attorney's fees, etc., was part of a statute regulating insurance. There was another provision seeking to localize all contracts of insurance between citizens or residents of the state and companies admitted to do business there, notwithstanding declarations in the contract that it is made outside the state; but this provision was not given any consideration in the opinion of the court.

[71] Note 44, *supra.*

[72] Note 46, *supra.*

[73] Note 52, *supra.*

[74] Fidelity & Deposit Co. v. Tafoya, note 44, *supra.*

[75] Ferry v. Ramsey, note 68, *supra.*

[76] Note 73, *supra.*

parently *Aetna Life Insurance Co.* v. *Dunken*[77] goes on the ground that it denies full faith and credit to the laws of another state to award attorney's fees and penalties in a suit on a policy of insurance properly governed by the laws of that state when those laws contain no provision for such emoluments of victory. While Mr. Justice Sutherland does not clearly place the decision on this ground, he says in relation to the issue of federal jurisdiction that "the contention that the contract is controlled by the law of Tennessee or Connecticut—in which event the Texas statute in respect of penalty and attorney's fee as construed and applied, is unconstitutional—clearly presents a substantial question under the full faith and credit clause." [78] The case which he adduces in support[79] has language from Mr. Chief Justice White to warrant this, but the case itself does not necessarily go farther than to hold that a judgment that a company has power to increase its assessments must be recognized as determining that issue for all purposes when it is rendered by the court of the chartering state.[80] Yet in the Dunken Case we find a unanimous Supreme Court allowing an utterance which indicates that the full faith and credit clause may be invoked as arbiter of a dispute whether the statute of one state rather than that of another is to be applied to the incidents of an insurance

[77] Notes 43 and 70, *supra.*

[78] 266 U. S. 389, 393 (1924).

[79] Supreme Council, Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724 (1915). At page 540, the Chief Justice said: "It is not disputable that, disregarding details, all the rights asserted under the assignments of error come to one contention, that a violation of the full faith and credit clause of the Constitution of the United States resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law and to apply that law, and in further refusing to give due effect to the decree rendered in Massachusetts concerning the subject of the controversy."

[80] At page 545 of the opinion it is said: "* * * if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment."

contract. Thus it may well be that all issues as to the extraterritorial application of statutes might have been considered and determined under the full faith and credit clause without invoking the Fourteenth Amendment.

Nor is the full faith and credit clause the only provision of the original Constitution which may prevent the extraterritorial application of statutes regulating contracts. The obligation of the contract may be impaired by applying an inappropriate law thereto, even though the inappropriate law is not retrospective. This has been determined to prevent extraterritorial application of a state bankruptcy law[81] and of a state tax law.[82] So it seems that in this section as in the preceding one we find the Fourteenth Amendment occasionally doing the work that might have been done by other parts of the Constitution. This of course is a figure of speech. The workers are the justices of the Supreme Court. The particular work of preventing the extraterritorial application of state statutes is one peculiarly appropriate to a national court. We may disagree with some of its chosen tests of extraterritoriality and yet still agree that it is well to have uniform tests laid down by a single judicial authority.

[81] Ogden v. Saunders, 12 Wheat. 213, 357-369 (U. S. 1927); Baldwin v. Hale, 1 Wall. 223 (U. S. 1864).

[82] Pittsburg, Fort Wayne and Chicago Railroad Co. v. Pennsylvania, and Delaware, L. & W. R. Co. v. Pennsylvania, announced in a note to "State Tax on Foreign Held Bonds," 15 Wall. 300, 326-328 (U. S. 1873), and given independently in 21 L. Ed. 189. For discussion of the reports of these cases, see Thomas Reed Powell, *Due Process Tests of State Taxation, 1922-1925*, 74 U. PA. L. REV. 423, 427-428.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—VI[1]

VIII. BUSINESS CONDUCT

ANY conduct that receives pecuniary reward may be deemed by a realist to be business conduct. Doctors [2] and lawyers [3] and teachers [4] may not like to be thought of as engaged in business, but their objection to regulation is seldom unrelated to the material compensation that follows from the practice of their art.[5] Agitators for a new economic order [6] are urging new forms of business for old. Fishing [7] is for some a preliminary to trade. The state engages in business when its activities replace those that are business activities when under private management.[8] Ven-

[1] For preceding instalments, see 17 VA. L. REV. 529-556, 653-675, 765-799, 18 VA. L. REV. 1-36, 131-169.

[2] Hayman v. Galveston, 273 U. S. 414, 47 Sup. Ct. 363 (1927), Hurwitz v. North, 271 U. S. 40, 46 Sup. Ct. 384 (1926), *supra,* pages 79, 80-81. For regulation of dentists, see Douglas v. Noble, 261 U. S. 165, 43 Sup. Ct. 303 (1923), and Graves v. Minnesota, 272 U. S. 425, 47 Sup. Ct. 122 (1926), *supra,* pages 78-79.

[3] Yeiser v. Dysart, 267 U. S. 540, 45 Sup. Ct. 399 (1925), *supra,* pages 82-83.

[4] Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. 625 (1923); Bartels v. Iowa, 262 U. S. 404, 43 Sup. Ct. 628 (1923); Pierce v. Society of Sisters of Holy Names, 268 U. S. 510, 45 Sup. Ct. 571 (1925); *supra,* pages 33-35, 65-69, 83-84.

[5] For regulation of various occupations, see Bratton v. Chandler (real estate brokers), 260 U. S. 110, 43 Sup. Ct. 363 (1922); Lehmann v. State Board of Public Accountancy (public accountants), 263 U. S. 394, 44 Sup. Ct. 128 (1923); Clarke v. Deckenbach (pool-room proprietors), 274 U. S. 392, 47 Sup. Ct. 630 (1927); Asakura v. Seattle (pawnbrokers), 265 U. S. 332, 44 Sup. Ct. 515 (1924); Herbring v. Lee (insurance agents), 280 U. S. 111, 50 Sup. Ct. 49 (1929); *supra,* pages 78-86, *passim.*

[6] Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625 (1925); Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641 (1927); Fiske v. Kansas, 274 U. S. 380, 47 Sup. Ct. 655 (1927); *supra,* pages 53-63.

[7] Miller v. McLaughlin, 278 U. S. 1, 49 Sup. Ct. 1 (1928), *supra,* page 120. For other cases on game and oysters and shrimps, see pages 44-46, 119-120.

[8] See section on Proprietary Interests, *supra,* pages 29-51.

ders of food [9] and drink [10] and theatre tickets [11] and gasoline [12] and comfortables [13] and fertilizers [14] are clearly engaged in business. So are landlords and those owners of land who conduct business operations thereon.[15] The conduct of financial operations [16] is conduct of business. Transportation [17] is business. Thus most of the cases already reviewed in this series and in another on public utilities [18] might be gathered together in the present section, if one wished to. So numerous are they that it seems undesirable to repeat them seriatim. All this suggests that some less inclusive caption would have been preferable for the material segregated here. Most of the cases deal with control over methods of trade and control over corporations as a way of regulating the activities in which they are engaged. Yet a heading that substituted trade for business would not be narrow enough to exclude many of the cases treated elsewhere. It would have the further disadvantage of requiring the reconstruction of this introduction, which may afford a real reason if not a good reason for not making the change.

Owing to the fact that most constitutional battles over price-fixing are assumed to turn on the question whether the regulated property and business are devoted to a public use or affected with a public interest, these quarrels have been catalogued in detail in

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[9] Burns Baking Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924); Hygrade Provision Co. v. Sherman, 266 U. S. 497, 45 Sup. Ct. 141 (1925); *supra,* pages 87-90.

[10] Oster v. Kansas, 272 U. S. 465, 47 Sup. Ct. 133 (1926); Hixson v. Oakes, 265 U. S. 254, 44 Sup. Ct. 514 (1928); *supra,* pages 93-94.

[11] Weller v. New York, 268 U. S. 319, 45 Sup. Ct. 556 (1925), *supra,* page 84.

[12] Standard Oil Co. v. Marysville, 279 U. S. 582, 49 Sup. Ct. 430 (1929), *supra,* pages 101-102.

[13] Weaver v. Palmer Brothers Co., 270 U. S. 402, 46 Sup. Ct. 320 (1926), *supra,* pages 120-121.

[14] Jones v. Union Guano Co., 264 U. S. 171, 44 Sup. Ct. 280 (1924), *supra,* page 122.

[15] For cases dealing with uses of land, see *supra,* pages 96-117, 123-131, *passim.*

[16] See section on Financial Relations, *supra,* pages 136-161.

[17] For cases on transportation, see *supra,* pages 36-44, 102-103. For fuller consideration of these cases, see Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930, II,* 29 MICH. L. REV. 1001-1030.

[18] See article cited in note 17, *supra.*

considering the application of state police power to what are contended to be public utilities.[19] A briefer summary must do here. An essay on various tests for determining when price-fixing is proper is to be found in the opinion of Mr. Chief Justice Taft in *Wolff Packing Co.* v. *Court of Industrial Relations*[20] which unanimously denied the power of the state to prescribe compulsory arbitration of labor disputes with resulting commands as to wage scales. The other cases have concerned the efforts to limit the excess over the box-office price which may be demanded by ticket brokers, to regulate the charges of employment agencies for securing positions for applicants for work, and to establish maximum prices to be charged for gasoline. All three efforts were declared unconstitutional.[21] The victory of the ticket broker caused dissent from Justices Holmes, Brandeis, Sanford and Stone. Mr. Justice Sanford concurred in the employment-agency case only out of deference to the precedent in the ticket-broker case. The other three remained unconverted. In remanding gasoline from the law of Tennessee to the law of supply and demand, only Mr. Justice Holmes persisted in dissent, although Justices Brandeis and Stone indicated want of warm admiration for the opinion of Mr. Justice Sutherland on behalf of the majority.

In *Tyson* v. *Banton*,[22] which involved ticket-brokers, Mr. Jus-

[19] See Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930, I,* 29 MICH. L. REV. 811-838. Here is included statement of Michigan Public Utilities v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925), and Frost v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605 (1926), holding that private carriers by motor vehicle cannot be required to become public carriers, thus indicating that more direct methods of regulating the charges of private carriers would not meet with the sanction of the court.

[20] 262 U. S. 522, 43 Sup. Ct. 630 (1923). This case will be dealt with in a succeeding section on Industrial Relations.

[21] For consideration of constitutional issues in price regulation, see Arthur S. Aiton, *Early American Price-Fixing Legislation,* 25 MICH. L. REV. 15; Norman F. Arternurn, *The Origin and First Test of Public Callings,* 75 U. PA. L. REV. 411; William A. Newman, *When Is a Business So Affected with a Public Interest that it May Be Regulated by Statute?,* 10 BI-MONTHLY L. REV. 15; Gustavus H. Robinson, *The Public Utility Concept in American Law,* 41 HARV. L. REV. 277; Henry Rottschaefer, *The Field of Governmental Price Control,* 35 YALE L. J. 438; F. Dumont Smith, *The Granger Cases,* 10 A. B. A. JOUR. 343; and Edgar Watkins, *The Law and the Profits, 32* YALE L. J. 29.

[22] 273 U. S. 418; 47 Sup. Ct. 426 (1927), considered in Maurice Finkelstein, *From Munn* v. *Illinois to Tyson* v. *Banton,* 27 COLUM. L. REV. 769;

tice Sutherland said that the issue was whether box-office prices of theatre tickets could be regulated, since the broker is "a mere appendage of the theatre." A further justification for considering another case from the one before him was that the legislature had declared in a preamble that the charge for admission to the theatre is a matter affected with a public interest. Mr. Justice Sutherland seemed to think that a decision sustaining what the legislature did would necessarily amount to approval of what the legislature said. Since, therefore, the majority thought that the box-office charge is not a matter affected with a public interest, it held that the excess charge of the broker could not be restricted. Mr. Justice Stone preferred to consider the issue before him and told how the broker through arrangement with many theatres secures a monopoly of the best seats and thus is in a position to exact exorbitant prices from those who can not get comparable opportunities elsewhere. He suggests that the phrase "affected with a public interest" is not a test of the propriety of price fixing but merely a figurative way of calling attention to the enterprises in which price fixing is permitted. Mr. Justice Sutherland concedes that the phrase "furnishes at best an indefinite standard" and that "attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation." [23] Yet by failing to do appreciably more than to reiterate paraphrases, he seems to justify the dissenting comment that "it is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided." [24]

Walton H. Hamilton, *Affectation with a Public Interest,* 39 YALE L. J. 1089; Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest,* 43 HARV. L. REV. 759; Maurice H. Merrill, *New Judicial Approach to Due Process and Price Fixing,* 18 KY. L. J. 3; and notes in 7 BOST. U. L. REV. 208; 40 HARV. L. REV. 1009; 22 ILL. L. REV. 192; 3 IND. L. J. 384; 13 IOWA L. REV. 99; 31 LAW NOTES 104; 25 MICH. L. REV. 880, reprinted in 61 AMER. L. REV. 607; 11 MINN. L. REV. 656; 1 ST. JOHNS L. REV. 213; 3 ST. JOHNS L. REV. 244; 2 U. CIN. L. REV. 80; 75 U. PA. L. REV. 778; 13 VA. L. REV. 554; and 36 YALE L. J. 985. The case in the court below is discussed in 24 COLUM. L. REV. 203; 9 CORNELL L. Q. 321; 37 HARV. L. REV. 1125, 1135; and 33 YALE L. J. 434. The decision of the Supreme Court is also treated in a number of the articles and notes listed in notes 25 and 27, *infra.*

[23] 273 U. S. 418, 430.

[24] *Ibid.,* 451.

In *Ribnik* v. *McBride* [25] employment agents were held immune from price regulation because they are brokers and not to be differentiated from ticket brokers who were held to be immune from regulation in the earlier case. In neither case does Mr. Justice Sutherland consider the monopolistic position of an intermediary, though the minority opinions deal with it in detail. The ticket broker was not saved because he was a broker but because the legislature had offended in declaring the theatre to be a place affected with a public interest. Now it is enough that the earlier case dealt with a broker.[26] In dissenting Mr. Justice Stone finds differences between ticket-brokers and employment agencies which justify subjecting the latter to regulation from which the former may be immune. The ticket broker sells a luxury to the fairly well-to-do. The employment agent offers hope of a necessity to the necessitous.

Some scars of the debate are evident in *Williams* v. *Standard Oil Co.*,[27] in which Mr. Justice Sutherland again says that the

[25] 277 U. S. 350, 48 Sup. Ct. 545 (1928), discussed in Donald Hall Hamilton, *Price Fixing by State Legislatures*, 3 TEMP. L. Q. 28; and notes in 8 BOST. U. L. REV. 292; 17 CALIF. L. REV. 55; 28 COLUM. L. REV. 970; 14 CORNELL L. Q. 75; 42 HARV. L. REV. 126; 23 ILL. L. REV. 611; 13 MARQ. L. REV. 114; 7 No. CAR. L. REV. 81; 3 ST. JOHNS L. REV. 104, 224; 14 ST. LOUIS L. REV. 83; 2 So. CALIF. L. REV. 277, 305; 3 U. CIN. L. REV. 69, 85; and 38 YALE L. J. 225. The case is also considered in some of the discussions listed in note 23, *supra*, and note 27, *infra*. For a general note on the problem, see 12 CALIF. L. REV. 511.

[26] In Tagg Brothers v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930), which sustained the power of Congress to authorize limitation of the charges of commission men selling live stock at stockyards, Mr. Justice Brandeis observed that the cases on ticket brokers and employment agencies did not hold that "charges for personal services cannot be regulated," but that "the question upon which the court divided in those cases was whether the services there sought to be regulated were then affected with a public interest." For comment on the decision in the court below, see 8 NEB. L. BUL. 183.

At the term of court beginning in October, 1930, when Mr. Chief Justice Hughes and Mr. Justice Roberts had succeeded Mr. Chief Justice Taft and Mr. Justice Sanford, it was held in O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931), over the dissent of Justices Van Devanter, McReynolds, Sutherland and Butler, that a state may forbid fire insurance companies to pay to any local agents higher commissions than they pay to other local agents in the state for soliciting similar risks.

[27] 278 U. S. 235, 49 Sup. Ct. 115 (1929), considered in Arthur L. Haugan, *Vicissitudes of the Price Fixing Doctrine*, 2 DAK. L. REV. 430; Estes Kefauver, *Legislative Price Control*, 7 TENN. L. REV. 193; Henry B. Witham,

test is whether the business is affected with a public interest. "Nothing is gained," he adds, "by reiterating the statement that the phrase is indefinite," since "that phrase, however it may be characterized, has become the established test," [28] etc. Thus the minority in the earlier cases are advised that acute analysis is futile unless it is backed up by a sufficient number of votes. That the analysis made something of an impression may be inferred from the suspicion of petulance in the answer that nothing is gained by it. Somewhat more specifically we learn that the sale of gasoline is not affected with a public interest even though gasoline is a public necessity and widely used. The claim of monopoly in the enterprise was dismissed as unsupported. There is a suggestion that it is not important, even if true, when Mr. Justice Sutherland interjects: "objections to the materiality of the contention aside." Another point in the case is that the intrinsically unconstitutional regulation is not saved from condemnation by reason of power to impose conditions on conduct of business by foreign corporations.[29]

State Regulation of Business, 7 TENN. L. REV. 177; and notes in 4 ALA. L. REV. 214; 17 CALIF. L. REV. 309; 24 ILL. L. REV. 482; 14 IOWA L. REV. 257; 13 MINN. L. REV. 378; 4 NOTRE DAME LAW. 475; 3 TEMP. L. Q. 321; 4 WASH. L. REV. 90; 38 YALE L. J. 674; and 39 YALE L. J. 674. The case is also considered in some of the articles and notes listed in notes 21, 22 and 25, *supra.* A similar state regulation of the price of gasoline is discussed in 6 NO. CAR. L. REV. 459 and 6 TENN. L. REV. 287.

War-time regulation of the price of coal was sustained by a unanimous court in Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 Sup. Ct. 314 (1929), as within the war power of Congress, at least with respect to coal sold to a manufacturer of snow plows for the use of railroads. Mr. Justice Butler pointed out that the coal might have been requisitioned for use by the government to aid in the prosecution of the war, and added that as the price fixed was not shown to be below what could have been demanded of the government, the constitutional complaint appeared to be one in favor of a right to sell the coal for more than it was worth. On the problem of the case, see Bevine Stedman, *Lever Act as a Civil Remedy,* 8 VA. L. REG. [N. S.] 641.

On other issues of price fixing, see William Draper Lewis, *Coal Price Regulation and the Constitution,* 109 ANN. AM. ACAD. SOC. & POL. SCI. (No. 200) 292; Sidney Post Simpson, *Due Process and Coal Price Regulation,* 9 IOWA L. REV. 145; and notes in 15 ST. LOUIS L. REV. 88, 414, on ice; in 12 VA. L. REV. 532, on tobacco warehouse; and in 21 MICH. L. REV. 455, on case holding municipal fuel yard not a public-service plant.

[28] 278 U. S. 235, 239, 49 Sup. Ct. 115 (1929).

[29] The question whether the rent regulation imposed by Congress for the District of Columbia had become unconstitutional by reason of change of

A statute of Minnesota which forbade buyers of milk, cream and butter fat to purchase at a higher price or rate in one locality than is paid for the same commodity by the same purchaser in another locality, subject to allowance for varying costs of transportation to the purchaser's plant, was held unconstitutional in *Fairmont Creamery Co.* v. *Minnesota*[30] over the dis-

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conditions was raised in Chastleton Corporation v. Sinclair, 264 U. S. 54, 44 Sup. Ct. 405 (1924), in which the court sent the case back to the trial court for determination of the current facts as to shortage of buildings and other circumstances on which the original constitutionality of the statute was predicated.

Validity of rent regulation is considered in Anonymous, *Due Process and the Housing Problem,* 5 CONST. REV. 101; F. R. Aumann, *Some Constitutional Aspects of War Rent Measures,* 18 KY. L. J. 355; and notes in 20 ILL. L. REV. 96, on case holding that the congressional statute above considered had become unconstitutional by reason of change in conditions; in 23 COLUM. L. REV. 309, on the application of the New York rent law to tenant taking possession after its enactment; in 26 COLUM. L. REV. 1015, on the extension of the New York emergency rent laws; and in 23 COLUM. L. REV. 583, on statutes relating to the housing shortage. Earlier discussions of rent regulation are listed in 20 MICH. L. REV. 274, note 25, and 21 MICH. L. REV. 207, note 3.

[30] 274 U. S. 1, 47 Sup. Ct. 507 (1927), considered in 22 ILL. L. REV. 533. On price discrimination, price agreements, and resale price fixing, see Cassius M. Clay, *Resale Price Maintenance,* 16 KY. L. J. 28; Charles Wesley Dunn, *Resale Price Maintenance,* 32 YALE L. J. 677; Edward C. Kelley, *The Doctrine of the Supreme Court of the United States Regarding Resale Price Maintenance is Warranted,* 6 OREG. L. REV. 252; Samuel Klaus, *Sale, Agency and Price Maintenance,* 28 COLUM. L. REV. 312; John Leland Mechem, *Price Discrimination as Unfair Competition,* 21 MICH. L. REV. 852; Frank F. Nesbitt, *The Legality of Resale Price Fixing,* 11 GEORGETOWN L. J. (No. 3) 26; Gilbert M. Montague, *Price Fixing, Lawful and Unlawful,* 62 AMER. L. REV. 505; Herman Oliphant, *Trade Regulation* [on price discrimination] 9 A. B. A. JOUR. 210; Paul A. Sayre, *Maintenance of Resale Prices,* 6 OREG. L. REV. 241; and editorial notes on re-sale price fixing, in 40 HARV. L. REV. 139; 13 IOWA L. REV. 324; 22 MICH. L. REV. 466; 24 MICH. L. REV. 709; 25 MICH. L. REV. 92; 1 NO. CAR. L. REV. 36; 4 TEMP. L. Q. 170; 75 U. PA. L. REV. 248, 365; 10 VA. L. REV. 483; and 35 YALE L. J. 1017; on price maintenance of patented articles, in 27 COLUM. L. REV. 183, 567; 40 HARV. L. REV. 656; and 2 TEMP. L. Q. 47; on price discrimination, in 14 CORNELL L. Q. 330; 23 COLUM. L. REV. 596; 38 HARV. L. REV. 103, 104; 42 HARV. L. REV. 680; 14 IOWA L. REV. 338, 362; 27 MICH. L. REV. 834; 3 WIS. L. REV. 243; and 38 YALE L. J. 804; on statutory regulation of unfair price-raising among buyers, in 26 COLUM. L. REV. 614; on conspiracy to regulate prices, in 7 BOST. U. L. REV. 322; 11 MARQ. L. REV. 163; and 4 TULANE L. REV. 649; on price fixing in sale of rice, in 15 ST. LOUIS L. REV. 88; and on an English case sustaining a price-maintenance contract, in 76 U. PA. L. REV. 1006.

sent of Justices Holmes, Brandeis and Stone. There was no dissenting opinion. For the majority, Mr. Justice McReynolds points out that the Act of 1923, under which the indictment was brought, omitted provisions in earlier Acts which restricted the prohibition to such price discrimination "for the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor." [31] The defendant offered to show that varying localities present varying conditions of competition, that prices are affected by quality of cream and by varying equipment of creameries, and that the variations in price are due "entirely to the economic conditions

[31] 274 U. S. 1, 4.

Several cases arising under the Sherman Act involved the question whether trade associations were instruments in unreasonable restraint of interstate trade. The decisions turned on the issue whether there was sufficient proof of actual concert in restricting production or in fixing prices. A combination was restrained in United States v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1929). Somewhat tentative certificates of health were awarded to the associations involved in Maple Flooring Manufacturers' Association v. United States, 268 U. S. 563, 45 Sup. Ct. 563 (1925), and Cement Manufacturers' Protective Association v. United States, 268 U. S. 588, 45 Sup. Ct. 588 (1925). On the general subject, see Robert T. Barton, Jr., *The Laws and Decisions Affecting Trusts, Monopolies and Trade Associations,* 12 VA. L. REG. [N. S.] 464; William J. Donovan, *The Legality of Trade Associations,* 11 PROC. ACAD. POL. SCI. (N. Y.) 571; Homer Hoyt, *Trade Associations and the Sherman Act,* 1 No. CAR. L. REV. 21; Benjamin S. Kirsh, *Foreign Trade Functions of Trade Associations: The Legal Aspects,* 76 U. PA. L. REV. 891; and *Trade Association Statistics: The Legal Aspect,* 14 A. B. A. JOUR. 133; Prather S. McDonald, *Trade Associations; Their Legitimate Activities, Their Economic Justification, and Their Legal Status,* 5 TENN. L. REV. 57; Robert S. Marx, *New Interpretations of the Anti-Trust Law as Applied to Business, Trade, Farm, and Labor Associations,* 2 U. CIN. L. REV. 211; Gilbert H. Montague, *New Opportunities and Responsibilities of Trade Associations as a Result of Recent United States Supreme Court Decisions,* 11 PROC. ACAD. POL. SCI. (N. Y.) 666; Herman Oliphant, *Trade Regulation,* 9 A. B. A. JOUR. 638; and *Trade Associations and the Law,* 26 COLUM. L. REV. 381; David L. Podell and Benjamin S. Kirsh, *Credit Bureau Functions of Trade Associations: The Legal Aspects,* 1 ST. JOHNS L. REV. 101, reprinted in 61 AMER. L. REV. 801; and *The Problem of Trade Association Law,* 2 ST. JOHNS L. REV. 1, reprinted in 62 AMER. L. REV. 94; Nathan Probst, Jr., *The Failure of the Sherman Anti-Trust Law,* 75 U. PA. L. REV. 122; George Roberts, *The Present Legal Status of Trade Associations and Their Problems,* 11 PROC. ACAD. POL. SCI. (N. Y.) 557; Maurice H. Robinson, *The Gary Dinner System: An Experiment in Co-operative Price Stabilization,* 7 SOUTHWESTERN SOC. & POL. Q. 137; and notes in 11 CORNELL L. Q. 123; 20 ILL. L. REV. 505; 24 MICH. L. REV. 316; 10 MINN. L. REV. 71; 9 ST. LOUIS L. REV. 67; and 1 TEX. L. REV. 355.

of each locality, and to competition." The exclusion of the offer entitled the court to treat the facts as established. In characterizing and condemning the statute, Mr. Justice McReynolds said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.
>
> The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil — high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse." [32]

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[32] 274 U. S. 1, 8-9.

Regulation of trade and competition is dealt with in the following articles: M. S. Breckenridge, *Some Phases of the Texas Anti-Trust Law,* 3 TEX. L. REV. 335; 4 TEX. L. REV. 129; and *Restraint of Trade in North Carolina,* 7 NO. CAR. L. REV. 249; Leon Goodman, *Constitutionality of the Act of 1923 (Va.) Regulating Sale of Leaf Tobacco,* 9 VA. L. REG. [N. S.] 721; Alvin C. Reis, *The Wisconsin Marketing Laws,* 9 MARQ. L. REV. 131; William H. Watkins, *The Fire Insurance Anti-Trust Suit in Mississippi,* 13 VA. L. REV. 108; E. F. Albertsworth, *The Federal Supreme Court and Industrial Development,* 16 A. B. A. JOUR. 317; Landon C. Bell, *The Rule of Unreason in Restraint of Trade Cases,* 12 VA. L. REG. [N. S.] 129; Ernest C. Carman, *Lawful Combinations in Restraint of Trade,* 12 MINN. L. REV. 341; Charles

The decisions referred to are those holding that abuses in the employment-agency business may not be remedied by forbidding the taking of fees from workers, and that abuses in the ticket-broker business may not be remedied by limiting the excess which the broker may charge over the box-office price. Cases which had sanctioned prohibitions going beyond the evil in order more securely to prevent the evil were distinguished by saying that they all recognize the duty of the court to inquire into the real effect of the statute and to declare it invalid "when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights." This amounts to saying that cases holding statutes constitutional afford no warrant for sustaining statutes that are unconstitutional.[33]

E. Carpenter, *Validity of Contracts Not to Compete,* 76 U. PA. L. REV. 244, reprinted in 7 OREGON L. REV. 127; Zechariah Chafee, Jr., *Equitable Servitudes on Chattels,* 41 HARV. L. REV. 945; Joseph P. Chamberlain, *Legislative Prohibitions of Unfair Practices,* 10 A. B. A. JOUR. 44; Wendell Herbruck, *Forestalling, Regrating and Engrossing,* 27 MICH. L. REV. 365; Harold Hirsch, *Competitive Conspiracy,* 1 GEORGIA L. REV. (No. 1) 8; Nathan Isaacs, *Business Postulates and the Law,* 41 HARV. L. REV. 1014; Franklin D. Jones, *Historical Development of the Law of Business Competition,* 35 YALE L. J. 905; 36 YALE L. J. 42, 207, 351; Albert M. Kales, *Coercive and Competitive Methods in Trade and Labor Disputes,* 8 CORNELL L. Q. 1, 128; Fritz E. Koch, *Methods of Regulating Unfair Competition in Germany, England, and the United States,* 78 U. PA. L. REV. 693, 854; Edward C. Lukens, *The Application of the Principles of Unfair Competition to Cases of Dissimilar Products,* 75 U. PA. L. REV. 197; E. Karl McGuinnis, *Present Legal and Practical Methods by Which Business Custom is Enforced,* 5 No. CAR. L. REV. 136; William Notz, *Recent Developments in Foreign Anti-Trust Legislation,* 34 YALE L. J. 159; Amasa C. Paul, *Unfair Competition and Its Late Developments,* 45 REP. AM. BAR ASS'N 400; Charles P. Pfarrer, *Contracts in Restraint of Trade,* 4 NOTRE DAME LAW. 244; Emerson P. Schmidt, *The Changing Attitude of the Supreme Court Toward Monopoly,* 12 MARQ. L. REV. 125; Thomas W. Shelton, *Unlawful Trade Combinations in History,* 12 A. B. A. JOUR. 121; A. Arthur Schiller, *Trade Secrets and The Roman Law,* 30 COLUM. L. REV. 837; and Edgar Watkins, *Anti-Trust Laws a Protection to Monopoly,* 96 CENT. L. J. 188.

Some of the articles above listed deal with federal regulations of trade. For discussion more particularly confined to federal regulation, see notes 33 and 34, *infra.*

[33] For consideration of issues arising in connection with the Sherman and Clayton Acts, see John H. Bishop, *Criminal Intent as Applied to Conspiracy under the Sherman Act,* 11 VA. L. REV. 417; Walter T. Duke, *Federal Anti-Trust Laws,* 8 VA. L. REV. 881; William J. Donovan, *Some Practical As-*

A possibly parodoxical application of the principle that criminal statutes must not be so indefinite as to fail to advise with some degree of clarity what conduct is prohibited appears in *Cline* v. *Frink Dairy Co.*[34] in which the indefiniteness appeared in

pects of the Sherman Law, 3 TEMP. L. Q. 343; Edwin W. Hadley, *Public Utilities and the Anti-Trust Act,* 10 BOST. U. L. REV. 351; Homer Hoyt, *New Trust Problems for Old,* 9 A. B. A. JOUR. 174; Ralstone R. Irvine, *The Uncertainties of Section 7 of the Clayton Act,* 14 CORNELL L. Q. 28; Nathan Isaacs, *Federal Control over Industry,* 16 AM. POL. SCI. REV. 422; Cornelius F. Kelley, *Relation of Anti-Trust Legislation to Conservation of Mineral Resources,* 53 REP. AM. BAR ASS'N 639; Felix H. Levy, *The Sherman Law and the Australian Statute,* 9 VA. L. REV. 409; and *The Sherman Law is Outworn. It Should be Amended,* 13 VA. L. REV. 597; Prather S. McDonald, *A Colloquial upon the Sherman Anti-Trust Laws,* 1 TENN. L. REV. [No. 2.] 1; Charles Nagel, *The Origin and Purpose of the Sherman Act,* 15 ST. LOUIS L. REV. 313; Herber H. Naujoks, *Monopoly and Restraint of Trade under the Sherman Act,* 4 WIS. L. REV. 386, 451; 5 WIS. L. REV. 1, 65, 129; Oliver E. Pagan, *What the Sherman Law Is, and What It is Not,* 12 GEORGETOWN L. J. 79; Emerson P. Schmidt, *Proposed Anti-Trust Law Changes—Competition on the Defensive,* 12 MARQ. L. REV. 25; Francis Walker, *The Development of the Anthracite Combination,* 109 ANN. AMER. ACAD. SOC. & POL. SCI. (No. 200) 234; Charles G. Washburn, *The History of a Statute,* 8 BOST. U. L. REV. 85; Horace R. Lamb, *The Relation of the Patent Law to the Federal Anti-Trust Laws,* 12 CORNELL L. Q. 261; David L. Podell and Benjamin S. Kirsh, *Patent Pools and the Anti-Trust Laws,* 13 A. B. A. JOUR. 430; H. C. Workman, *Patent Pools in Relation to Patent Law,* 13 A. B. A. JOUR. 585; and notes on relation of Clayton Act to agreements and licenses in connection with patents, in 1 AIR L. REV. 132; 28 COLUM. L. REV. 828; 38 YALE L. J. 246; and 39 YALE L. J. 290; on acquisition of stock of another corporation making somewhat similar product but selling in different territory and to different clientele, in 24 ILL. L. REV. 908; 14 MARQ. L. REV. 175; 4 TULANE L. REV. 638; 38 YALE L. J. 630; and 39 YALE L. J. 1042; and on application of anti-trust law to holding companies organized by parent railway corporations, in 78 U. PA. L. REV. 652.

[34] 274 U. S. 445, 47 Sup. Ct. 681 (1927), discussed in 22 ILL. L. REV. 757.

For consideration of the Federal Trade Commission Act and proceedings for its enforcement, see Anonymous, *Limiting Government's Inquisitorial Powers,* 8 CONST. REV. 183; Minor Bronaugh, *"Unfair Methods of Competition" under the Federal Trade Commission Act,* 27 LAW NOTES 127; *The Federal Trade Commission—Its Powers and Functions,* 26 LAW NOTES 45; and *Development of Jurisdiction and Powers of Federal Trade Commission,* 30 LAW NOTES 125; Nelson B. Gaskill, *Public Interest versus Private Interest in the Federal Trade Commission Act,* 11 PROC. ACAD. POL. SCI. (N. Y.) 673; Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission,* 28 COLUM. L. REV. 708, 905; Gregory Hankin, *The Jurisdiction of the Federal Trade Commission,* 12 CALIF. L. REV. 170; *Functions of the Federal Trade Commission,* 6 ILL. L. Q. 183; *Judicial Review of the Federal Trade Commission Orders,* 6 ILL. L. Q. 264; and *Validity and*

a proviso relaxing the grasp of the prohibitory clauses. The Colorado statute denounced combinations and conspiracies to restrict trade, to increase or reduce the price of commodities, to prevent competition, to fix a standard for price control, or to bind the parties to maintain prices, and then added that these provisions should not include agreements having for their purpose the securing of only a reasonable profit in such merchandise as could not be marketed for a reasonable profit except with the aid of combinations proscribed in the earlier section. This exception made lawful not only the designated agreements necessary to secure a reasonable profit but also membership in associations making such agreements. The provisos, said Mr. Chief Justice Taft, make the line between the licit and the illicit depend not only upon what commodities can be marketed at a reasonable profit only by the aid of restraining agreements, but also upon what would be a reasonable profit generally for the business and

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Constitutionality of the Federal Trade Commission Act, 19 ILL. L. REV. 17; George C. Lay, *The Federal Trade Commission—Its Origin, Operation and Effect,* 60 AMER. L. REV. 338; L. A. Lecher, *The Anti-Trust Law and the Federal Trade Commission,* 9 MARQ. L. REV. 229; Felix H. Levy, *A Decade of the Federal Trade Commission,* 11 VA. L. REV. 21, 111, 196, 278, 372; David E. Lilienthal, *The Power of Governmental Agencies to Compel Testimony,* 39 HARV. L. REV. 694; John Leland Mechem, *A Change in the Policy of the Federal Trade Commission,* 11 A. B. A. JOUR. 637; and *Fishing Expeditions by Commissions,* 22 MICH. L. REV. 765; Gilbert H. Montague, *Anti-Trust Laws and the Federal Trade Commission,* 27 COLUM. L. REV. 650; and *Anti-Trust Laws and the Federal Trade Commission: 1914-1926,* 12 A. B. A. JOUR. 328; Herman Oliphant, *The Extent of the Jurisdiction of the Federal Trade Commission over Unfair Methods of Competition,* 9 A. B. A. JOUR. 698; and *Trade Regulation,* 9 A. B. A. JOUR. 311; Tracy C. Peycke, *The Federal Trade Commission: Its Present Scope and Increasing Importance,* 7 MINN. L. REV. 11; George Rublee, *The Original Plan and Early History of the Federal Trade Commission,* 11 PROC. ACAD. POL. SCI. (N. Y.) 666; Leighton P. Stradley, *Constitutionality of Compulsory Statistical Reports to the Federal Trade Commission,* 76 U. PA. L. REV. 19; A. Toliefson, *Judicial Review of the Decisions of the Federal Trade Commission,* 4 WIS. L. REV. 257; Edgar Watkins, *The Federal Trade Commission,* 97 CENT. L. J. 385; and notes in 95 CENT. L. J. 97, 259; 11 CALIF. L. REV. 265; 23 COLUM. L. REV. 695, 758; 26 COLUM. L. REV. 594; 30 COLUM. L. REV. 270; 41 HARV. L. REV. 675; 43 HARV. L. REV. 285, 839; 22 ILL. L. REV. 304; 24 ILL. L. REV. 815; 31 LAW NOTES 81; 26 MICH. L. REV. 565; 27 MICH. L. REV. 931; 28 MICH. L. REV. 195, 923, 924; 9 ST. LOUIS L. REV. 294; 2 TEX. L. REV. 531; 71 U. PA. L. REV. 260; 75 U. PA. L. REV. 463; 9 VA. L. REV. 143; 32 YALE L. J. 514; 33 YALE L. J. 667; and 38 YALE L. J. 804.

what would be a reasonable profit for the particular enterpriser under the circumstances of his particular business. In the particular case, for example, it would "be a complete defense for the defendant to prove * * * that it is impossible to sell milk or milk products, except by trust methods and make a reasonable profit, if he also showed that by such methods he had in fact only made a reasonable profit." [35] Thus the whole statute has no fixed standard of guilt. The basis for judgment which the court and jury would be supposed to follow is more impractical and complicated than that of whether prices charged are reasonable or excessive, which was held to be too indefinite in a decision condemning the price-regulating feature of the war-time Lever Act of Congress. The behest of the statute would tax the ingenuity of traders as much as one previously condemned for indefiniteness in making invalid combinations to fix prices at a figure higher than what they would have been under conditions of free competition. The present statute therefore comes within the rule that the due-process requirement of the Fourteenth Amendment "imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may

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[35] 274 U. S. 445, 457.

For law-review discussions of various forms of unfair competition, see notes in 22 COLUM. L. REV. 665, on intent to injure, as affecting an otherwise lawful act; in 37 HARV. L. REV. 143, 165, on justification for interfering with a business; in 22 MICH. L. REV. 57, on effect of motive in starting competition; in 30 COLUM. L. REV. 510, on privilege to disparage a non-competing business; in 17 GEORGETOWN L. J. 67, on right of manufacturer to enjoin retailer from unfair competition; in 23 COLUM. L. REV. 690, on inducing breach of contract; in 38 HARV. L. REV. 123, on interference with advertising rights; in 11 CALIF. L. REV. 438, on injunction against solicitation of former customers; in 28 COLUM. L. REV. 81, on enforcibility of contracts not to compete after a term of employment; in 12 MINN. L. REV. 185, on solicitation of customers of former employer; in 39 HARV. L. REV. 518, on unfair competition by false representations; in 33 YALE L. J. 885, on changing name for photo-play; in 2 BOST. U. L. REV. 275, on right to relief from infringement of trade secrets; in 30 COLUM. L. REV. 135 and 43 HARV. L. REV. 330, on copying designs; in 2 NO. CAR. L. REV. 54, on restraining unfair competition by simulation of yellow cabs; in 1 TEX. L. REV. 235 and 72 U. PA. L. REV. 300, on unfair competition by use of one's own name; and in 28 COLUM. L. REV. 286; 10 BOST. U. L. REV. 265; and 15 IOWA L. REV. 223, on use or simulation of trade name. On protection of trade marks, see references in note 36, *infra.*

know what standard of conduct is intended to be required." [36] The ensuing part of the opinion is devoted to establishing that the standard of reasonable profit is more indefinite than the standard of restraint of trade contained in the Sherman Law. The proof seems to be that the Sherman Law does not predicate legality upon reasonable or unreasonable prices, whereas the offending Colorado statute does. While on issues of negligence a man may find his conduct subject to the unanticipatable vote of a jury which may make his conduct obnoxious to one penal statute rather than to another or to none, "it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." [37]

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[36] 274 U. S. 445, 458.

On problems arising in connection with trade marks from standpoints both of unfair competition and of protection of owner and of public, see C. H. Grismore, *Fraudulent Intent in Trade Mark Cases,* 27 MICH. L. REV. 857; Milton Handler and Charles Pickett, *Trade Marks and Trade Names—An Anaylsis and Synthesis,* 30 COLUM. L. REV. 168, 759; Edward S. Rogers, *Some Suggestions Concerning a Trade-Mark Registration Statute,* 45 REP. AM. BAR ASS'N 412; and notes in 23 COLUM. L. REV. 500, on protection of assignee of trade mark from unfair competition by purchaser of products from assignor; in 28 COLUM. L. REV. 353, on restrictions upon the assignment and license of trade marks and trade names; in 30 COLUM. L. REV. 242, on nature of recovery in law of trademarks and unfair competition; in 42 HARV. L. REV. 839, on unfair competition through owner's use of registered trade mark; in 43 HARV. L. REV. 636, on assignment of pre-war trade mark; in 24 ILL. L. REV. 474, on effect of registration of trade mark; in 23 ILL. L. REV. 386 and 27 MICH. L. REV. 326, on extent of protection of trade mark; in 15 VA. L. REV. 586, on unfair competition in connection with trade marks—"same general class test"; in 4 WIS. L. REV. 230, on territorial extent of trade mark protection; and in 37 YALE L. J. 394, on whether trade mark for lock and keys can be used by different person for electric batteries and flashlights.

[37] 274 U. S. 445, 465.

When the Sherman Law is applied by way of injunction or award of damages, it is a safe assumption that the activities thus penalized may constitutionally be forbidden, even though the constitutional issue was not raised in the cases. In addition to United States v. American Linseed Oil Co., note 31, *supra,* the following cases found offenses against the Sherman or Clayton Acts: Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 49 Sup. Ct. 112 (1929), condemning discrimination in prices so as substantially

The issue of the constitutionality of the Kentucky Co-operative Marketing Act came before the court in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association,*[38] which affirmed a judgment against a non-co-operative

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to lessen competition, although the competition involved is in the line of business of the purchasers and not of the vendors; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 Sup. Ct. 248 (1931), giving damages for conspiracy to monopolize accomplished by cutting prices below cost of production; United States v. Sisal Sales Corporation, 274 U. S. 268, 47 Sup. Ct. 592 (1927), enjoining effectuation of complete monopoly in importation and interstate sale of sisal, made effective by acts in the United States, although plan was aided by acts in Mexico and by favorable legislation of government of Mexican state: Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 51 Sup. Ct. 42 (1930), condemning agreement between distributors of motion picture films controlling 60 per cent of the business, whereby they refuse to contract with exhibitors except upon terms which coerce submission of all disputes to final judgment of arbitrators; United States v. First National Pictures, 282 U. S. 44, 51 Sup. Ct. 45 (1930), condemning agreement between distributors controlling 98 per cent. of the business, restricting furnishing of films to new patrons unless cash security is given for performance of contract.

For notes on the Paramount Case in the lower court, see 43 HARV. L. REV. 666 and 39 YALE L. J. 884. On the Story Parchment Case in the lower court, see 43 HARV. L. REV. 1163 and 39 YALE L. J. 1035. On other issues of restraint of trade, see notes in 10 CALIF. L. REV. 425, on tying clauses in lease of machines; in 27 COLUM. L. REV. 838, on exclusive agency system; in 24 COLUM. L. REV. 654, on acquisition of patents in restraint of trade; in 37 HARV. L. REV. 1142, on combination of patentees; in 6 TEX. L. REV. 210, on exclusive territory agreements as affected by Texas anti-trust law; and in 8 TEX. L. REV. 302, on agreement between insurance companies to limit agents' commissions.

[38] 276 U. S. 71, 48 Sup. Ct. 291 (1928), discussed in 28 COLUM. L. REV. 815; 2 DAK. L. REV. 305; 23 ILL. L. REV. 282; 7 TENN. L. REV. 123; and 7 TEX. L. REV. 306.

For other consideration of co-operative marketing, see Henry W. Ballentine, *Co-operative Marketing Associations,* 8 MINN. L. REV. 1; Edmund Brown, Jr., *Co-operative Marketing of Tobacco,* 1 No. CAR. L. REV. 216; A. B. Butts, *Agrarian Legislation in the State of Mississippi,* 2 MISS. L. REV. 434; Joseph P. Chamberlain, *The Co-operative Marketing Act,* 8 A. B. A. JOUR. 416; Walton H. Hamilton, *Judicial Tolerance of Farmers' Co-operatives,* 38 YALE L. J. 936; Gerard C. Henderson, *Co-operative Marketing Associations,* 23 COLUM. L. REV. 91; Charles L. Goldberg, *Co-operative Marketing and Restraint of Trade,* 12 MARQ. L. REV. 270; Milton J. Keegan, *Power of Agricultural Co-operative Associations to Limit Production,* 26 MICH. L. REV. 648; Theodore R. Meyer, *The Law of Co-operative Marketing,* 15 CALIF. L. REV. 85; Matthew O. Tobriner, *Co-operative Marketing and the Restraint of Trade,* 27 COLUM. L. REV. 827; and *The Constitutionality of Co-operative*

warehouse company for knowingly permitting a member of a co-operative association to break his contract with the association and for knowingly accepting and receiving for sale from such member the tobacco which he was under contract to deliver to the co-operative association. The judgment was for a $500 penalty and a $100 attorney fee authorized by the statute. The statute authorized the formation of the co-operative associations to be composed solely of producers and to handle only tobacco provided by its members. It declared that the contracts with members should not be illegal and that the association should not be deemed a conspiracy, illegal combination, or monopoly. It specifically forbade knowing interference with the contracts between an association and its members by such purchase as the defendant had here made of tobacco which the member had previously contracted to deliver to the association. The first section of the defendant's answer averred that the co-operative association was an organization conducted "for the express purpose of unlawfully and contrary to the common law, creating and carrying out restrictions in trade." This, said Mr. Justice McReynolds, presents no Federal question, since "the present controversy concerns a statute, and a state may freely alter, amend, or abolish the common law within its jurisdiction." The contention that the statute abridges defendant's privileges and immunities as a citizen of the United States received the answer that "a corporation does not possess the privileges and immunities of a citizen of the United States within the meaning of the Constitution." Earlier the opinion had observed that "in order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising

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Marketing Statutes, 17 CALIF. L. REV. 19; Abe B. Waldauer, *The Tobacco Growers' Association Case,* 5 TENN. L. REV. 123; Howard B. Wilson, *Legal Status of Co-operative Marketing Movement,* 14 A. B. A. JOUR. 575; and notes in 23 COLUM. L. REV. 74; 37 HARV. L. REV. 145, 162; 38 HARV. L. REV. 87, 120; 39 HARV. L. REV. 121; 21 ILL. L. REV. 378; 11 IOWA L. REV. 275, 389; 8 MINN. L. REV. 158; 10 MINN. L. REV. 59; 2 No. CAR. L. REV. 188; 14 VA. L. REV. 226; 2 WIS. L. REV. 478; and 32 YALE L. J. 819.

On other favoritism toward agriculture, see note in 74 U. PA. L. REV. 743, on exception in Anti-trust Act in favor of agricultural products, and note in 39 YALE L. J. 1208, on restricting the use of a public market to the products of farms.

under the Constitution or laws of the United States properly asserted below." This might be taken to mean that the propriety of various provisions of the statute are left unconsidered, but Mr. Justice McReynolds seems to go further and indicate express approval when he says:

> "Certainly the statute impaired no right of the warehouse company guaranteed by the Fourteenth Amendment by merely authorizing corporations with membership limited to agriculturalists and permitting contracts for purchase and resale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The state may declare its own policy as to such matters." [39]

Possibly it is to point out that this permissive legislation does not discriminate against others that a little later the opinion continues:

> "The court below affirmed 'there is no statute at present in this state, nor was there any when the cause of action herein arose, against pools, trusts, and monopolies'. Considering this and further declarations in the same opinion, we cannot say that any common law rule recognized in the state of Kentucky forbade associations or contracts similar to those before us when intended to promote orderly marketing. Undoubtedly the state has power to authorize formation of corporations by farmers for the purpose of dealing in their own products. And there is nothing to show that since the Bingham Act producers may not form voluntary associations and through them make and enforce contracts like those expressly authorized." [40]

Then comes consideration of the question whether the peculiar protection of these co-operative marketing contracts deprives the warehouse company of equal protection of the laws or conflicts with the due process clause of the Fourteenth Amendment because without reasonable basis and purely arbitrary. Apparently the equal-protection complaint is given final consideration by the ensuing paragraph which says:

> "The statute penalizes all who wittingly solicit, persuade, or

[39] 276 U. S. 71, 89-90.
[40] *Ibid.*, 90.

induce an association member to break his marketing contract. It does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal-protection clause." [41]

The question whether this is the final dismissal of the equal-protection complaint is of interest because in an earlier case a majority of the Supreme Court held in effect that a man is unconstitutionally denied the equal protection of the laws if he is deprived of a right of action against some offenders instead of against all.[42] So here it might have been urged that the warehouseman in some way might invoke the equal-protection clause because instead of being subject to penalty for knowing interference with all contracts, he was to be amerced only because of interference with one particular type of contract. While Mr. Justice McReynolds later justifies the selection of this particular type of contract for protection from interference, it is only after he seems to say that the equal-protection clause cannot be invoked by one who is not discriminated against. Little sympathy is extended toward any claim of a constitutionally protected liberty to interfere with contracts when it is said:

"Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandisement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe." [43]

Then follow invocations of other co-operative marketing legislation and of state decisions sustaining it, and the opinion concludes as follows:

"The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes pro-

[41] *Ibid.*, 91.
[42] Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921).
[43] 276 U. S. 71, 92.

mote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. * * * And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. * * * Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.

The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. * * * A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it." [44]

The co-operative association involved in the preceding case was one in which only producers may be members and one which may deal only in the produce of members. A different type of co-operative came before the court in *Frost* v. *Corporation Commission* [45] in which a majority of the court found it a denial of equal protection of the laws to permit such co-operative to secure a license for a cotton gin without any showing of public necessity while private cotton gins must show such necessity in order to start in business. The plaintiff was a private ginner who had received a license upon such a showing. To accord him a standing as litigant, the majority had to hold that his license was a property right entitling him to the protection of equity. The minority pointed out that this presented an issue of state law and that the state court had held the license not a franchise. Two other hurdles faced the majority before they could rightly reach the issue of discrimination. The first was whether the alleged discrimination if found to appear and to be unconstitutional would not render the whole statute unconstitutional, which would

[44] *Ibid.*, 96-97.

[45] 278 U. S. 515, 49 Sup. Ct. 235 (1929), discussed in 9 BOST. U. L. REV. 296; 29 COLUM. L. REV. 833; 24 ILL. L. REV. 812; and 28 MICH. L. REV. 179.

mean that the requirement of a showing of public necessity for the plaintiff would be eliminated. If such were the case, he would be deprived of his complaint that a license was issued to others on easier terms than the one granted to him. Such would be the result, conceded Mr. Justice Sutherland for the majority, if the provision relieving the stock co-operatives from the public-necessity requirement were in the original statute. For then it could not be held that the co-operatives should make such a showing, if the legislature had explicitly declared the contrary, and the court would have to hold the whole statute unconstitutional. But here the Oklahoma statute was originally free from the alleged unconstitutional favor to the co-operatives. This was introduced as an amendment in 1925. If it is unconstitutional, it leaves the Act as it was originally. The result in such case is that a certificate of necessity must be required of all and that one who has complied with the requirement may object to the grant of a license to one who has not, if he can premise his complaint upon an interference with his property right. The answer of Mr. Justice Brandeis is two-fold. First: The legislature may at any time wholly repeal the requirement of a certificate of necessity and thereby subject the plaintiff to unlimited competition. Therefore "it is difficult to see how the lesser enlargement of the possibilities of competition by a license granted under the 1925 proviso could operate as a denial of constitutional rights." Second: Cotton gins are constitutionally declared to be public utilities. A franchise to operate a public utility is not part of the liberty of the citizen. Such franchises may be granted or withheld at the pleasure of the state. They may be granted to corporations only, thus excluding all individuals. Thus the individual fortunate enough to be admitted to the privilege may not complain of the more favorable terms on which others are admitted, because the Federal Constitution places no limits upon the state's discretion. In a separate dissent Mr. Justice Stone touches upon the same considerations.

The second hurdle for the majority to leap is indicated by Mr. Justice Brandeis when he points out that the alleged property right of the plaintiff "to conditional immunity from competition rests wholly on the statute now challenged" and when he invokes the canon that "it is settled that one cannot in the same proceed-

ing both rely upon a statute and assail it." Mr. Justice Sutherland answers that the proviso was an amendment and was unconstitutional and therefore of no effect — "a nullity wholly 'without force or vitality', leaving the provisions of the existing statute unchanged." To this he adds:

> "It necessarily results that appellant's rights came into being and owed their continued existence wholly to that statute, disconnected from the ineffective proviso, and it is that statute, so disconnected, which measures the extent to which he may enjoy and defend such rights. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming or denying nor in contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of estoppel in pais or of a waiver of the right to maintain the constitutional challenge here made." [46]

These proceedural hurdles in the way of granting relief to a petitioner who suffered only because others received more easily what he had successfully obtained for himself were not noticed by Mr. Justice Sutherland until the close of his opinion after he had already declared it unconstitutional to impose on individuals a condition not put in the way of the co-operative associations. He seems to treat the issue as it would be presented by one who had been denied a license. He nowhere mentions the point of the minority that the legislature might distribute its favors as it chose, since permission to conduct a public utility is not a matter of common right. This could hardly have been escaped if the plaintiff had been denied a license and was complaining on that ground. It seems to be avoided on the notion that the recipient of a license has a property right which entitles him to raise constitutional objections against favors to others which render his own favor less valuable.

Coming then to the substance, we find the issue turning on the question whether these stock co-operatives are true co-operatives. Mr. Justice Sutherland grants that true co-operatives may constitutionally be favored. The true co-operatives are those organized under an Oklahoma statute of 1917. They have no capital stock and pay no dividends. In so far as they are allowed to

[46] 278 U. S. 515, 528.

deal in the products of non-members, they must perform their service at cost and may subject the non-member to liabilities corresponding to those that may be imposed on members. This, says Mr. Justice Sutherland, leaves the difference between members and non-members too insignificant to affect the character of the corporation as a mutual association. But the co-operatives organized under the later Act of 1919 are declared to be so different as to be in no sense mutual associations. Mr. Justice Sutherland's description of them and his judgment upon them is quoted in the margin.[47] This description either slurs over or omits several facts. Mr. Justice Sutherland says that the stock "up to a certain amount" may be subscribed for by any person. He does not disclose that this limit is $500, that each shareholder is entitled to one and to only one vote whether his contribution is $10 or $500, and that no person may become a shareholder of the co-operative without the consent of the board of directors. In his analysis he omits also any clear reference to the provisions

[47] "A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to non-members, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation" (278 U. S. 515, 524-525).

that permit five per cent of the profits to be set aside for educational purposes and that require ten per cent of the profits to be set aside for a reserve fund until the reserve is at least fifty per cent of the capital stock, though in his earlier recital he had said that "provision is made for setting aside a surplus or reserve fund; and five per cent may be set aside for educational purposes." [48] These facts not stressed by Mr. Justice Sutherland are adduced by Mr. Justice Brandeis to emphasize methods available to exclude capitalist control and to cast doubt on the assertion of the majority that these stock co-operatives, like their individual competitors, do "business with the general public for the sole purpose of making money." Mr. Justice Brandeis insists that the majority judgment that the classification of the statute is arbitrary rests upon the two erroneous assumptions that the stock co-operatives organized under the statute of 1919 are substantially different from the non-stock co-operatives organized under the Act of 1917, and that there is no substantial difference between the stock co-operatives and the ordinary commercial corporations. After comparing the two types of co-operatives,[49] he reviews at length the history of the movement

[48] 278 U. S. 515, 518. Even this earlier statement does not disclose that the provision for setting aside a percentage of the earnings to create a surplus is a requirement and not a mere permission.

So also the statement quoted in note 46, *supra*, with respect to patronage dividends does not disclose that these distributions of the excess income are required. It is a very different thing to require such patronage dividends than merely to allow them. Mr. Justice Sutherland dismisses the requirement as insignificant because commercial corporations are at liberty to do the same thing. Certainly an enterpriser would feel very differently toward a requirement to distribute profits to patrons than toward a mere freedom to do so if, when, and as he wished. This requirement of return of profits to patrons seems to be the predominating substantive element in the co-operative plan. Other elements are mainly instrumental. If the requirement is to be called insignificant in the case of the stock co-operative, it would seem to be insignificant in the case of the nonstock association. In both it is the instrument of making profits for producers instead of from them. Any voluntary use of the instrument by private enterprisers would be for the purpose of making profits from producers rather than for them.

[49] "The provisions for the exclusion of capitalist control of the nonstock type of co-operative organized under the Oklahoma Act of 1917 do not differ materially in character from those in the 1919 Act. The nonstock co-operative also may reject applicants for membership; and no member may have more than one vote. This type of co-operative is called a non-profit organi-

and the reasons why the adoption of the stock plan proved necessary to the success of the co-operative movement and to the adequate protection of producers. Experience shows that the doing of business for non-members is usually essential to the success of a co-operative. The stock plan is the only one adapted to such enterprises as cotton ginning which require a large investment in plant and a considerable fixed capital. Congress in the Capper-Volstead Act and in the revenue laws has recognized both types as true co-operatives. The stock type of co-operative is the older and is much more widely used in the United States and other English-speaking countries. Thus experience as well as analysis confirms the conclusions that the co-operative movement demands for success the use of the stock type of association and that this stock type is in essential respects closely akin to the non-stock type and very different from the ordinary commercial enterprise. Mr. Justice Holmes joins in the dissent of Mr. Justice Brandeis and in that of Mr. Justice Stone, and each of them joins in the dissent of the other.

In a passage quoted from Mr. Justice Sutherland's opinion in the preceding case, it was said that "the provision for paying a portion of the profits to members or, if so determined, to non-members based on the amounts of their sales to or purchases from the corporation, is a device which, without special statutory

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zation; but the term is merely one of art, indicating the manner in which the financial advantage is distributed. This type also is organized and conducted for the financial benefit of its members and requires capital with which to conduct its business. In the stock type the capital is obtained by the issue of capital stock, and members are not subjected to personal liability for the corporation's business obligations. In the nonstock type the capital is obtained partly from membership fees, partly through dues or assessments and partly through loans from members or others. And for fixed capital it substitutes in part personal liability of members for the corporation's obligation. In the stock type there are eo nomine dividends on capital and patronage dividends. In the nonstock type the financial benefit is distributed by way of interest on loans and refunds of fees, dues and assessments. And all funds acquired through the co-operative's operations, which are in excess of the amount desirable for a "working fund," are to be distributed as refunds of fees, dues and assessments. Both acts allow business to be done for non-members; and though the nonstock association may, it is not required, to impose obligations on the non-member for the liability of the association. Thus, for the purposes here relevant, there is no essential difference between the two types of co-operatives" (278 U. S. 515, 537-538).

authority, may be and often is resorted to by ordinary corporations for the purpose of securing business." [50] Thus the fact that the stock co-operatives were required to apportion a designated excess of profits among members and non-members was said to lack both relevancy and substance as a basis for the classification attempted. Nevertheless in *Corporation Commission* v. *Lowe* [51] a private cotton ginner sought to adduce the principle of the *Frost* case to support an objection to the grant of a license to a co-operative gin on the ground that he would be discriminated against because the co-operative could do business on more favorable terms by reason of its return to patrons of a portion of its profits. Mr. Chief Justice Hughes rejected the complaint because there was no support in the facts for the alleged discrimination. The private ginner could not bring forward any provision in the Oklahoma statutes forbidding him to distribute his profits to patrons, and counsel for the commission stated that he knew of no such provision. Therefore it was assumed that the private ginner was as free to conduct a profitless business as was his co-operative competitor. Because of this privilege he was not denied equal treatment. Apparently the co-operative gin was organized on the stock basis and sought its license upon a showing of convenience and necessity. The private ginner operated one gin within two and a half miles from the proposed site of the co-operative gin and operated another within ten miles of that site. He had protested against the grant of a license to the co-operative, and it was agreed that the commission would grant the license unless restrained. The situation suggests the possibility that the Oklahoma commission may be more readily persuaded of the convenience and necessity of a competing co-operative gin than of a competing private one and may therefore now and then by administrative grace supply in practice what the Supreme Court excluded from the Oklahoma statute by the decision in the *Frost* case. No such complaint was presented by the private ginner in the case at bar. While there is constitutional basis for such a complaint in the case of an ordinary occupation,[52] the issue is more difficult in the case of utilities. Obvi-

[50] Note 47, *supra.*

[51] 281 U. S. 431, 50 Sup. Ct. 397 (1930).

[52] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (1886).

ously the Supreme Court cannot undertake to review the fairness of every administrative decision.

A statute of Pennsylvania confined the ownership of pharmacies and drug-stores to licensed pharmacists, and specified that corporations and partnerships must be composed wholly of licensed pharmacists in order to conduct such enterprises, with an exception in favor of corporations and partnerships already engaged in business within the state. In declaring the statute unconstitutional in *Liggett Co.* v. *Baldridge,*[53] Mr. Justice Butler pointed out that Pennsylvania had already adequately regulated the prescription and sale of drugs to protect health, and insisted that there was no reasonable relation between the ownership of a drug store and the protection of the public health. He noted that there were many chain-stores engaged in the business of selling drugs, that their stock was sold in the market and must be held widely by persons who are not pharmacists, and insisted that "if detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming." "None has been produced", he continued, "and, so far as we are informed, either by the record or outside of it, none exists." In a dissenting opinion in which Mr. Justice Brandeis concurred, Mr. Justice Holmes said:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowlege is an evil. The selling of drugs and poisons calls for knowledge in a high

[53] 278 U. S. 105, 49 Sup. Ct. 57 (1928), discussed in J. Ross Harrington, *The Chain Store Era and the Law,* 4 NOTRE DAME LAW. 491; and notes in 9 BOST. U. L. REV. 43; 17 CALIF. L. REV. 665, 690; 29 COLUM. L. REV. 211; 42 HARV. L. REV. 435; 13 MARQ. L. REV. 180; 13 MINN. L. REV. 377; 7 N. Y. UNIV. L. REV. 82; 4 NOTRE DAME LAW. 397; 8 OREG. L. REV. 286, 295; 3 ST. JOHNS L. REV. 244; 2 SO. CALIF. L. REV. 388; 3 TEMP. L. Q. 438; 7 TEX. L. REV. 474; 3 U. CIN. L. REV. 169; 63 U. S. L. REV. 485; and 15 VA. L. REV. 376, 381. On the same statute or similar ones, see notes in 15 IOWA L. REV. 369; 31 LAW NOTES 223; 27 MICH. L. REV. 954; 3 NOTRE DAME LAW. 216; 13 ST. LOUIS L. REV. 159; 76 U. PA. L. REV. 860; and 37 YALE L. J. 667. In 7 TENN. L. REV. 43, is a note on legislation regulating sale of iodine, less drastic than the statute on drug stores; in 76 U. PA. L. REV. 207, a note on a case holding unconstitutional a statute prohibiting vending of drugs in original packages except by registered pharmacists.

degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned Act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession. * * *

But for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think, however, that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.

Of course the appellant cannot complain of the exception in its favor that allows it to continue to own and conduct the drug stores that it now owns. The 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and those of a later time." [54]

Mr. Justice Holmes had the whole court with him in *Roschen* v. *Ward* [55] in which he wrote the opinion sustaining a Massachusetts statute making it unlawful to sell at any established place of business spectacles for the correction of vision unless a duly licensed physician or duly qualified optometrist be in charge of the place where the articles are sold in such store. "Of course", he observed, "we cannot suppose the Act to have been passed for sinister motives. * * * We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense."

[54] 278 U. S. 105, 114-115.

[55] 279 U. S. 337, 49 Sup. Ct. 336 (1929).

The conduct of business by corporations is subject to peculiar regulations by reason of peculiar powers over corporations.[56] These regulations in so far as they concern foreign corporations customarily take the form of requiring registration of companies doing business within the state and the appointment of an agent to accept service of process on suits arising out of business done within the state. A frequent provision designates a state officer as one on whom process against the company may be served in suits arising out of such business, whether the foreign corporation has been duly registered or not. Another common provision declares invalid all contracts made within the state by unregistered foreign corporations and forbids suits in state courts on such contracts. The enforcement of these various requirements depends upon whether the business was done within the state and whether the enterpriser is one whom the state may exclude from unlicensed activities. This latter question may turn on the issue whether the business is interstate commerce or upon the issue

[56] For discussions of various problems of legislative control over corporations, see Henry W. Ballantine, *Changes in the California Laws*, 17 CALIF. L. REV. 529; and *Changes in the Corporate Securities Act*, 17 CALIF. L. REV. 536; A. A. Berle, Jr., *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563; John B. Bullington, *Jurisdiction over Foreign Corporations*, 6 No. CAR. L. REV. 147; James A. Burkhardt, *The History of the Development of the Law of Corporations*, 4 NOTRE DAME LAW. 221; E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977; *Nebraska Business Corporations*, 5 NEB. L. BUL. 165; and *Amendment of Corporate Articles under the New Ohio General Corporation Act*, 4 U. CIN. L. REV. 129; William Grafton Elliott, Jr., *Some Constitutional Aspects of Corporate Citizenship*, 16 GEORGETOWN L. J. 45; Oliver P. Field, *The Status of a Private Corporation Organized under an Unconstitutional Statute*, 17 CALIF. L. REV. 327; Henry E. Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws*, 42 HARV. L. REV. 516; Joseph F. Francis, *The Domicil of a Corporation*, 38 YALE L. J. 335; R. Paul Holland, *Should a Corporation Be Considered a Citizen under the Privileges and Immunities Clause of the Federal Constitution?*, 36 W. VA. L. Q. 245, 330; Louis B. Marshall, *When Doing Business Is Illegal*, 12 VA. L. REG. [N. s.] 89; J. Putman, *State Interference, under the Reservation Clause, with Contracts between the Stockholders of Corporations*, 7 N. Y. UNIV. L. REV. 487; Lulu Radzinski, *The Power of the Legislature to Alter, Amend, or Repeal Charters of Private Corporations*, 22 BI-MONTHLY L. REV. 127; Bryant Smith, *Legal Personality*, 37 YALE L. J. 283; and Joseph L. Weiner, *Theory of Anglo-American Dividend Law: American Statutes and Cases*, 29 COLUM. L. REV. 461; and *Legislative Recognition of the Close Corporation*, 27 MICH. L. REV. 273.

whether the business is being done by an individual citizen or by a corporation or some other organization that may be treated like a corporation.[57]

The question in *Hemphill* v. *Orloff*[58] was whether a Massachusetts trust may be regarded as a foreign corporation. By Massachusetts statutes the association could be sued by service of process upon one of its trustees and its property is subject to attachment and execution in the same manner as that of a corporation. The Massachusetts courts support the provisions in the articles of association under which both trustees and members are exempt from personal liability for the debts of the trust. The trust is not ended by the death of a shareholder, and shareholders do not have title to the trust property. Upon these facts Mr. Justice McReynolds declared that the organization has the ordinary functions and attributes of a corporation and is subject to similar treatment. It is therefore not entitled to the protection of the clause declaring that "the citizens of each state shall

[57] Among law-review discussions of corporate regulations are notes in 18 CALIF. L. REV. 289, on power of legislative investigating committee over private corporations; in 18 KY. L. J. 294, on corporation as a person under the due-process and equal-protection clauses; in 22 MICH. L. REV. 502, on prohibition of common-law trusts by the Washington Constitution; in 2 ST. JOHNS L. REV. 82, on the New Ohio Corporation Act; in 14 VA. L. REV. 129, on sufficiency of notice by mail of stockholders' meetings; in 27 MICH. L. REV. 580, on seizure of stock certificates under the war power; in 36 YALE L. J. 692, on forbidding entrance of foreign corporation organized with powers denied to domestic corporations; in 25 MICH. L. REV, 51, on invalidity of contracts due to failure to file annual report; in 25 COLUM. L. REV. 806, on enforcibility of contracts of unlicensed foreign corporations; in 4 TEX. L. REV. 528, on revocation of license for violation of unconstitutional statute; in 39 YALE L. J. 904, on suit on contract made outside the state where there has been failure to comply with condition of doing business within the state; in 3 WIS. L. REV. 100, on regulation of foreign corporations; in 29 COLUM. L. REV. 968, on internal regulation of foreign corporations; in 5 NEB. L. BUL. 226, on ouster of foreign corporation for payment of dividend out of capital; and in 11 CORNELL L. Q. 230, on cumulative preferred stock. On power to amend corporate charters, see 29 COLUM. L. REV. 88, 525; 14 CORNELL L. Q. 85; 43 HARV. L. REV. 656; 25 MICH. L. REV. 300; 28 MICH. L. REV. 1009; 14 MINN. L. REV. 413; 3 ST. JOHNS L. REV. 283; 77 U. PA. L. REV. 256; and 16 VA. L. REV. 282.

[58] 277 U. S. 537, 48 Sup. Ct. 577 (1928), discussed in 16 CALIF. L. REV. 548; 14 CORNELL L. Q. 70; 23 ILL. L. REV. 717; 27 MICH. L. REV. 317; 15 VA. L. REV. 249, 271; and 5 WIS. L. REV. 174. The decision in the court below is considered in 41 HARV. L. REV. 86.

be entitled to all privileges and immunities of citizens in the several states." Like a foreign corporation it may be excluded from doing business without the consent of the state. The provision enforced in the case at bar was one declaring invalid the contracts made without authority. Upon suit on such a contract the state court had given judgment for the defendant solely because of the plaintiff's non-compliance with the statute, and this the Supreme Court affirmed.

Similarly in *Bothwell* v. *Buckbee Mears Co.*[59] already reviewed in the section on financial relations, conduct of business within the state by an unregistered foreign corporation was the basis upon which the doors of the state court were held rightly closed to the receiver of the intruding company. Only because no business was done in the state was it held in *Minnesota Commercial Men's Association* v. *Benn* [60] that suit could not be commenced against a foreign corporation by service of process on the secretary of state. Of course any power over a foreign corporation which is premised on a general power to exclude must lose that justification when nothing has been done in the state by the corporation or its agents.

The question is different when in some respects the corporation has concededly subjected itself to the state. Formerly there was a notion that the power to exclude carries with it a power to exact conditions of entrance that involve subjection to what otherwise might not be required. How much is now left of that notion it would be difficult to say. Mr. Justice Holmes put it to one side in *Palmetto Fire Insurance Co.* v. *Conn* [61] as no justification for controlling outside business, but in *Compania General de Tobaccos de Filipinas* v. *Collector of Internal Revenue* [62] the fact that a foreign insurance company was doing business within the jurisdiction was adduced in justification for a tax on a policy of insurance issued outside the jurisdiction on property within the jurisdiction. The idea seemed to be that settlement of disputes in respect to the outside policies might involve some exercise of the license to do business within the jurisdiction. The decision

[59] 275 U. S. 274, 48 Sup. Ct. 124 (1927), *supra,* pages 149-150.
[60] 261 U. S. 140, 43 Sup. Ct. 292 (1923), *supra,* page 148.
[61] 272 U. S. 295, 47 Sup. Ct. 88 (1926), *supra,* pages 143-145.
[62] 275 U. S. 87, 48 Sup. Ct. 100 (1928), *supra,* pages 145-148.

rests on rather special facts and was reached in reluctant deference to an earlier precedent. It therefore lends little support to the ancient notion that power to keep out gives some arbitrary power to control acts of those let in.

The decision in *Hemphill* v. *Orloff* [63] shows well enough that power to keep out still includes power to keep out. Does it still include arbitrary power to exact performance of conditions precedent to entering? There is language by Mr. Chief Justice Taft in *Hanover Fire Insurance Co.* v. *Harding* [64] which might be taken to mean that genuine conditions of entrance may be devised arbitrarily by the state.[65] These remarks, however, are directed toward pecuniary exactions of a discriminatory character criticised as intrinsically a denial of equal protection of the laws. Owing to the rule that a corporation outside the state is not a person within the jurisdiction of the state, the Chief Justice may mean no more than that no equal-protection complaint is available against a genuine condition of admission. The inference that he does not mean very much and the possibility that what he may mean is inconsistent with what he would deem it proper for the court to decide are perhaps warranted by his later statement that "while a state may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights." [66] The case held that a discriminatory annual

[63] Note 58, *supra*.

[64] 272 U. S. 494, 47 Sup. Ct. 179 (1926).

[65] "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden, which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind" (272 U. S. 494, 510-511).

[66] 272 U. S. 494, 514.

The Hanover Fire Case was cited in Power Manufacturing Co. v. Saun-

tax on foreign corporations was not a condition precedent to doing business within the state and could not be made so by statutory declaration that failure to comply with the demands of the state requires revocation of the license and refusal to renew it. If we are to reconcile the apparent diversities of the opinion, we may do so by assuming that requirements as to subsequent conduct will not be regarded as conditions precedent to admission. This would not mean that corporations could not be admitted only for limited activities or that the fact of their alienage would not justify some special burdens and restrictions. It would mean only that arbitrary power is confined to real conditions precedent and cannot by anticipatory language turn a condition subsequent into a condition precedent.

Once upon a time it was the idea that a foreign corporation could never become a person within the jurisdiction under the aegis of the equal-protection clause, even though duly admitted to do business within the state. This had been nibbled down by the Supreme Court before the period under review,[67] and the *Hanover Fire Insurance Case*[68] continues the process. Apparently the court means now to hold that a foreign corporation duly admitted to the state becomes a person within the jurisdiction under the equal-protection clause as soon as it has an established business. It can then complain of discriminatory treatment, at least during the period of its license. Whether the established business is an essential can not be ascertained from a case hold-

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ders, 274 U. S. 490, 47 Sup. Ct. 678 (1927), for the proposition that "a foreign corporation by seeking and obtaining permission to do business in a state does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States." This case held that a foreign corporation could not be subjected to suit in any county in the state when domestic corporations can be sued only in counties where they are found or do business or have a representative. The decision was based upon the equal-protection clause without discussion of the question whether the foreign corporation had become a person within the jurisdiction. In a dissent in which Mr. Justice Brandeis concurred, Mr. Justice Holmes invoked a qualified form of the doctrine that intrinsically unconstitutional conditions may be attached to the grant of a privilege. The case is discussed in notes in 8 BOST. U. L. REV. 134; 41 HARV. L. REV. 93; and 6 NEB. L. BUL. 303.

[67] Southern Railway Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287 (1910).

[68] Note 64, *supra*.

ing that it is enough.[69] Each new nibble at the ancient canon may presage others to follow. *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation* [70] holds that a foreign corporation bringing suit in the state court to recover property brought into the state by one alleged to be a converter is for this purpose a person within the jurisdiction and may adduce the equal-protection clause against an unfavorable procedural discrimination. To this new nibble, Justices Holmes and Brandeis objected. The Hanover Fire decision was unanimous. It will not be surprising if the time will soon arrive when regulations of the conduct of foreign corporations within the state must rely for their constitutionality upon justifications intrinsic in the conduct and the regulation, without aid from any aura of arbitrary authority formerly supposed to emanate from the conceded power to keep the stranger from coming in at all.

The problem is too intricate to discuss in detail in a presentation conceived on a narrative plan. It does not lend itself to treatment in a study arranged topically on the major basis of the power of the state which is involved and on the minor basis of the practical interests or relationships subjected to the exercise of that power. The issue of so-called "unconstitutional conditions" arises not only in connection with police power but in connection with taxation as well. It is presented not only by due-process and equal-protection clauses, but also by the commerce clause and by the tacit command that states and nation must not

[69] All that is said on the point by Mr. Chief Justice Taft is the following: "In the present case there is no such permanent investment in the state of Illinois as there was in the Greene Case in Alabama, but the averments of the bill show that the complainant has from year to year secured renewal of its license in the state of Illinois, and has through many years past built up a large good will in the state of Illinois and has associated with it a large number of agents in the various counties of the state, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policyholders, the character and nature of their policies and other records, the value of all of which would be destroyed if excluded from the state by a denial of the equal protection of the laws. In the Greene Case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (272 U. S. 494, 508-509).

[70] 262 U. S. 544, 43 Sup. Ct. 636 (1923), discussed in 2 WIS. L. REV. 428.

interfere with each other's governmental operations. It may protrude its head in still other fields, as it certainly does in statutory construction. Never was a power to deny assumed to be a justification for every conceivable requirement attached to a partly relenting grant. Not yet is a power to deny assumed to lend no added weight to any exaction imposed on those who have not had complete denial thrust upon them. If the private interest at stake has such precarious constitutional standing that it has no defense against complete denial, it should not be endowed with unlimited license to look gift horses in the mouth. On the other hand there are constitutional considerations of broader import than the protection of the particular litigant who may chance to invoke them. A bargain fair as to him might be obnoxious to interests of others who may suffer from that bargain. If claims to constitutional protection are to be put up at auction, all interested in the claims ought to have adequate representation at the vendue. There are competing considerations in the problem of unconstitutional conditions which no logic can solve except by begging the question. Hence we may expect the courts to act in the future as they have acted in the past—to seize the dilemma now by one horn, and now by the other.

The cases involving the peculiar constitutional position of corporations have either been treated elsewhere or will find a place in a succeeding section dealing with incidents of rights of action. The unanimous decision frustrating the wage-fixing feature of the Kansas compulsory arbitration plan [71] falls most appropriately in the pocket of industrial relations. Of the remaining ten cases here reviewed, only three sustained the legislation. They were unanimous decisions allowing the states to forbid the sale of eye-glasses except under the supervision of qualified physicians or optometrists,[72] to grant a special status to agricultural co-operative associations which confine their activities to the products of agricultural members,[73] and to permit a broader type of stock co-operative association to compete with private cotton ginners though the former are required to distribute their

[71] Wolff Packing Co. v. Court of Industrial Relations, note 20, *supra.*

[72] Roschen v. Ward, note 55, *supra.*

[73] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association, note 38, *supra.*

profits to members and patrons while the latter are free to be as generous or as niggardly as they please.[74]

Of the seven remaining cases declaring legislation unconstitutional, only one satisfied a unanimous court. This condemned for indefiniteness the provisions of a statute forbidding combinations in restraint of trade.[75] In all of the other six cases, Mr. Justice Holmes dissented. He was alone in objecting to a denial of the power of the state to regulate the price of gasoline.[76] Mr. Justice Brandeis joined him in thinking that the majority misread the Constitution when they found in it an obstacle to a requirement that corporations and partnerships starting new drug stores must confine their membership to pharmacists.[77] These two dissenters carried Mr. Justice Stone along with them when the court held that states may not regulate the charges of employment agencies,[78] may not forbid purchasers of milk and cream to buy at higher prices in one locality than in another after allowance for difference in cost of transportation,[79] and may not allow stock co-operative associations not confined to producers to enter upon the enterprise of ginning cotton without a showing of the convenience and necessity imposed as a condition upon the grant of a license to a private ginner.[80] The three became four when Mr. Justice Sanford joined in thinking that it was their five colleagues rather than the Constitution that prevented the states from limiting the differential in the broker's charge for theatre tickets.[81] While Mr. Justice Sanford held the same attitude toward restriction of the fees of employment agencies,[82] he yielded to the majority out of deference to the precedent previously established over his dissent.

Mr. Chief Justice Taft was with the majority in all these cases, though he had dissented from the decision denouncing a

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[74] Corporation Commission v. Lowe, note 51, *supra.*
[75] Cline v. Frink Dairy Co., note 34, *supra.*
[76] Williams v. Standard Oil Co., note 27, *supra.*
[77] Liggett Co. v. Baldridge, note 53, *supra.*
[78] Ribnik v. McBride, note 25, *supra.*
[79] Fairmont Creamery Co. v. Minnesota, note 30, *supra.*
[80] Frost v. Corporation Commission, note 45, *supra.*
[81] Tyson v. Banton, note 22, *supra.*
[82] Ribnik v. McBride, note 25, *supra.*

minimum-wage law for women.[83] Had he remained firm in the essentials of the faith there expressed by him, the ticket brokers and the employment agencies would have missed the constitutional solace that now is theirs. Had Mr. Justice Stone succeeded Mr. Justice McKenna before the Minimum Wage Case, that decision in all probability would not have been rendered. With Mr. Justice Brandeis not sitting, the court would have again been divided four to four, as it had been earlier.[84] Had Mr. Justice Brandeis not deemed himself disqualified, these later price-fixing statutes would have had a precedent in their favor and might have been approved. Not that cases decide cases, for *stare decisis* does not keep determined judges from persisting in views that majority brethren have rejected. With others, however, precedents make more of a difference. Quite clearly Mr. Chief Justice Taft and Mr. Justice Sanford found it easier to accede to views that have mustered a majority than to persist in dissent. They would be more likely to remain consistent with themselves when this would conduce to consistency in the decisions of the court. The course of judicial history might well have been quite different if Mr. Justice Brandeis had never been counsel in the Minimum Wage Case from Oregon[85] and had therefore been available to change that tie vote to a five to four adjudication that the law was constitutional. Thus sometimes it almost seems that the meaning of the Constitution is in part at least dependent upon circumstances but dimly in the vision of its progenitors.

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[83] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923), to be reviewed in a succeeding section on Industrial Relations.

[84] Stettler v. O'Hara, 243 U. S. 629, 37 Sup. Ct. 475 (1917).

[85] Note 84, *supra*.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—VII [1]

IX. INDUSTRIAL RELATIONS

LABOR legislation deals with a number of matters that might properly fall under the heads of physical conditions, personal conduct, and liabilities. It includes regulations to promote health and safety by limiting hours of labor and restricting employment of children, by prescribing safeguards against accident and designating methods and standards of compensation when accidents befall. Workmen's compensation has been justified in part as an incentive to employers to take more precautionary measures than they might otherwise choose. Its rise has been due to a judgment that the common-law rules of liability have been especially inept in their application to industrial accidents, and that normal judicial procedure works at its worst with parties so unevenly situated. It is an important contribution to better relations between employers and employees and it seems wise to include it in a section dealing specifically with such relations rather than to leave it for subsequent treatment in association with other regulations of liabilities and incidents of rights of action.

Other labor legislation with which we have to deal is concerned with incidents of the labor contract and with modes of waging labor warfare and methods of settling labor quarrels.[2]

[1] For previous instalments, see 17 VA. L. REV. 529-556, 653-675, 765-799, 18 VA. L. REV. 1-36, 131-169, 270-305.

[2] On various phases of labor problems, see Edwin F. Albertsworth, *Industrial Law—Some Developments and Tendencies*, 23 ILL. L. REV. 789; John B. Andrews, *Labor Legislation in 1923*, 23 AM. POL. SCI. REV. 417; Newton D. Baker, *Labor Relations and the Law*, 8 A. B. A. JOUR. 731; John J. Coniff, *Industrial Peace*, 31 W. VA. L. Q. 35; William R. Eaton, *The Industrial Law of Colorado*, 97 CENT. L. J. 3; Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGIS. REV. 154; Fowler Vincent Harper, *Due Process of Law in State Labor Legislation*, 26 MICH. L. REV. 599, 763, 888; James M. Kerr, *Union Labor Before the Law*, 57 AMER. L. REV. 239; John H. S. Lee, *Problems Which Have Arisen in Recent Labor*

Since labor is not commerce, it might seem that with these matters the Congress of the United States would have little to do. In fact, however, the Sherman and Clayton Acts have been the assumed arbiters of some of the most far-reaching labor issues. Into the interpretation and application of these statutes the Supreme Court has woven its preferred ideas of desirable common-law rules, as it has applied these ideas in important cases initiated in the federal courts by reason of the diversity of citizenship of the parties. The attitude of the Supreme Court on distinctly constitutional issues shows a striking similarity to its notions of common law. It has seemed desirable, therefore, to include here, both in text and in footnotes,[3] discussion of industrial re-

Decisions in Illinois, 18 ILL. L. REV. 77; Alpheus T. Mason, *The Labor Decisions of Chief Justice Taft,* 78 U. PA. L. REV. 585; John M. Matthews, *State Labor Legislation,* 5 ILL. L. Q. 100; Murray T. Quigg, *Function of the Law in Relation to Disputes Between Employers and Employees,* 9 A. B. A. JOUR. 795; Donald R. Richberg, *Developing Ethics and Resistant Law,* 32 YALE L. J. 109; Walter H. Saunders, *A Review of Recent Decisions Affecting Labor and Employment,* 15 GEORGETOWN L. J. 361; Francis Bowes Sayre, *Labor and the Courts,* 39 YALE L. J. 682; Sidney Post Simpson, *Constitutional Rights and the Industrial Struggle,* 30 W. VA. L. Q. 125; Charles Thaddeus Terry, *Law and Order in Industrial Disputes,* 9 A. B. A. JOUR. 115; and Edwin E. Witte, *Early American Labor Cases,* 35 YALE L. J. 825. For further references to discussion of miscellaneous questions, see note 3 *infra.*

[3] On miscellaneous matters arising out of relations between employer and employees, see notes on statute prohibiting threats to discharge employee not purchasing goods at company store, in 28 COLUM. L. REV. 513; 41 HARV. L. REV. 796; and 14 VA. L. REV. 375, 394; on regulation of false advertising by employment agency as to strike or lockout, in 3 WIS. L. REV. 316; on forbidding deduction of wages for time spent in voting, in 18 ILL. L. REV. 56; 24 ILL. L. REV. 705; and 9 VA. L. REV. 655; on statute regulating defaulting employee's recovery for services rendered, in 43 HARV. L. REV. 647; on mechanic's lien law in New York, in 29 COLUM. L. REV. 996; on labor legislation of 1929, in 19 AM. LAB. LEGIS. REV. 417; on Report of American Bar Association Committee on Commerce, in 43 REP. AM. BAR ASS'N 337; on plan to promote industrial peace, in 14 A. B. A. JOUR. 166; on legal consequences flowing from trade agreements, in 24 COLUM. L. REV. 409; on rights and privileges in labor controversies, in 32 YALE L. J. 809; on legality of combination to restrict competition in services, in 25 COLUM. L. REV. 647; on contract regulating limitation of output, in 73 U. PA. L. REV. 211; on liability of labor union for procuring employer to break contract with other manufacturer who finished hats with non-union labor, in 7 MINN. L. REV. 69; on civil liability of members of unincorporated union, in 42 HARV. L. REV. 550; on elements of fair trial in disciplinary proceedings in labor unions, in 30 COLUM. L. REV. 847.

lations without regard to the distinction between constitutional law and other law.

An order of the Kansas Court of Industrial Relations which required a manufacturer of food stuffs to pay the increase of wages determined upon by the court was declared unconstitutional in *Wolff Packing Co.* v. *Court of Industrial Relations*[4] on the ground of unjustifiable interference with the freedom of contract protected by the Fourteenth Amendment. The Kansas statute had declared that the manufacture of food stuffs and clothing, the production of fuel and some other enterprises were businesses affected with a public interest. This evoked from Mr. Chief Justice Taft an essay on the demarcation of the class of business affected with a public interest,[5] but he left undetermined whether the manufacture of food might be so regarded, and held

[4] 262 U. S. 522, 43 Sup. Ct. 630 (1923), considered in Minor Bronaugh, *Business Clothed with a Public Interest Justifying State Regulation,* 27 LAW NOTES 87; William L. Huggins, *Just What Has the Supreme Court Done to the Kansas Industrial Act? Why Did It Do It?,* 11 A. B. A. JOUR. 363; Dexter Merriam Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine,* 25 MICH. L. REV. 596; C. Petrus Peterson, *Industrial Courts,* 3 NEB. L. BUL. 487; Herbert Rabinowitz, *The Kansas Industrial Court Act,* 12 CALIF. L. REV. 1; Sidney Post Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration,* 38 HARV. L. REV. 753; and notes in 12 CALIF. L. REV. 35; 96 CENT. L. J. 273; 38 HARV. L. REV. 1097; 22 MICH. L. REV. 135; and 33 YALE L. J. 196.

For discussions prior to the Supreme Court decision, see John T. Clarkson, *The Industrial Court Bill,* 6 IOWA L. BUL. 153; J. S. Dean, *The Fundamental Unsoundness of the Kansas Industrial Court Law,* 7 A. B. A. JOUR. 333; John A. Fitch, *Government Coercion in Labor Disputes,* 80 ANN. AMER. ACAD. POL. AND SOC. SCI. (No. 179) 74; William L. Huggins, *A Few of the Fundamentals of the Kansas Industrial Court Act,* 7 A. B. A. JOUR. 265; H. W. Humble, *The Court of Industrial Relations in Kansas,* 19 MICH. L. REV. 675; Fred H. Peterson, *Industrial Court,* 85 CENT. L. J. 352; F. Dumont Smith, *The Kansas Industrial Court,* 47 REP. AM. BAR ASS'N 208 and 95 CENT. L. J. 456; and *Practical Operation of Kansas Industrial Court Law,* 8 A. B. A. JOUR. 680; William R. Vance, *A Proposed Court of Conciliation,* 1 MINN. L. REV. 107; and *The Kansas Court of Industrial Relations with its Background,* 30 YALE L. J. 456; George W. Wickersham, *Recent Extensions of State Police Power,* 54 AMER. L. REV. 801; J. S. Young, *Industrial Courts with Special Reference to the Kansas Experiment,* 5 MINN. L. REV. 39, 185, 353; and notes in 20 MICH. L. REV. 893; 6 MINN. L. REV. 69, 159, 251; and 31 YALE L. J. 75, 206, 889. For other discussion of industrial arbitration, see references in notes 6 and 7, *infra.*

[5] For a more extended review, see Thomas Reed Powell, *State Utilities and the Supreme Court, 1922-1930,* 29 MICH. L. REV. 811, 817-821.

that at any rate the state could not regulate the wages in such an enterprise. It was of course an essential part of the plan of compulsory arbitration that the employer should be compelled to continue to operate and pay the wages fixed by the court and that the employees should not strike against acceptance of the decree. Otherwise the decree might invite a lockout or a strike and accomplish little or nothing. Employees were permitted to leave one by one and not in concert, and the employer might receive permission from the court to abandon his business if he could continue to conduct it under the decree only at a heavy loss. This privilege, the Chief Justice declared to be under the circumstances "generally illusory." He lays down squarely that there is no police power that can compel continuous operation of an enterprise which, if affected with a public interest to any degree, is thus affected only by what he calls a "change in pais." By this he means to distinguish the traditionally accepted public callings from enterprises like grain elevators, grist mills, etc., which creep into the class of "business affected with a public interest" by some "peculiar relation to the public." This latter class is the only one that can possibly include enterprises dealing with food, fuel and clothing. While a common carrier which accepts a franchise must keep on going so long as he retains his franchise, the case is different with the ordinary enterpriser "when, by mere changed conditions, his business becomes clothed with a public interest. He may stop at will, whether his business be losing or profitable." Such is also the constitutional rule for the employees of such an enterprise. Inasmuch as the Kansas plan involved restraint on striking, the effect of the Act on the employee may be a factor in the judicial judgment in a case in which only the employer is protesting. After declaring that public regulation of such an enterprise as this cannot "secure continuity of a business against the owner" the Chief Justice proceeds:

> "* * * If that be so with the owner and employer, *a fortiori* must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be some-

> times justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition, express or implied, of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." [6]

Kansas urged the precedent of the decision sustaining the Adamson Law, but the Chief Justice made the distinction that there was in Kansas no such emergency about continued production of foodstuffs as there was an emergency concerning nation-wide transportation when the Adamson Law was passed. Moreover that statute dealt with the business of railroading in which there is concededly the duty to continue. While the opinion of the Chief Justice is concerned almost wholly with the issue of compulsory continued operation, the concluding paragraph declares that "we think the Industrial Court Act, in so far as it permits

[6] 262 U. S. 522, 541 (1922).

For discussion of the problem of arbitration of industrial disputes and of foreign experience with arbitration tribunals, see Henry Winthrop Ballantine, *Evolution of Legal Remedies as a Substitute for Violence and Strikes,* 69 ANN. AMER. ACAD. POL. AND SOC. SCI. (No. 158) 140; James H. Brewster, *A Comparison of Some Methods of Conciliation and Arbitration of Industrial Disputes,* 13 MICH. L. REV. 185; L. Ward Bannister, *The Administrative Settlement of Industrial Disputes by Compulsory Arbitration,* 2 CORNELL L. Q. 163; W. Jethro Brown, *The Judicial Regulation of Industrial Conditions,* 27 YALE L. J. 425; *Effect of an Increase in the Living Wage by a Court of Industrial Arbitration upon Vested Rights and Duties under Pre-existing Awards,* 32 HARV. L. REV. 892; and *The Separation of Powers in British Jurisdictions,* 31 YALE L. J. 24; J. B. Clark, *Is Authoritative Arbitration Inevitable?,* 17 POL. SCI. Q. 553; Horace B. Davis, *The German Labor Courts,* 44 POL. SCI. Q. 397; Henry B. Higgins, *A New Province for Law and Order,* 29 HARV. L. REV. 13; 32 HARV. L. REV. 189; 34 HARV. L. REV. 105; S. H. Kauffman, *Limiting the Right to Strike,* 84 CENT. L. J. 121; George S. Ramsay, *The Power and Duty of the State to Settle Disputes Between Employer and Employee,* 51 AMER. L. REV. 801; Howard S. Ross, *The Canadian Industrial Dispute Investigation Act,* 2 CORNELL L. Q. 176; Carl I. Wheat, *American Legislation for the Adjustment of Industrial Disputes,* 28 W. VA. L. Q. 29; and notes in 17 COLUM. L. REV. 174, on meditation and arbitration statutes; in 22 MICH. L. REV. 49, on conciliation of labor controversies under the North Dakota Act of 1921; in 13 LAW NOTES 184, on compulsory arbitration in Pennsylvania; and in 13 LAW NOTES 222, 223, on proposed arbitration statute in Massachusetts.

the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of property and liberty of contract without due process of law."

Upon receiving the mandate of the Supreme Court in the case just reviewed, the Kansas court vacated its original judgment and awarded a new writ compelling obedience to the paragraphs in the order of the Industrial Court which fixed hours of labor and provided for extra pay for overtime. In *Wolff Packing Co.* v. *Court of Industrial Relations,*[7] the Supreme Court declared itself bound by the determination of the state court that the statute's provisions as to hours of labor are separable from the provisions as to wages, but held the order as to hours of labor invalid because it was based on the statute which contained the controlling and dominating feature of compulsory arbitration. In the words of Mr. Justice Van Devanter:

> "The survey just made of the Act, as construed and applied in the decisions of the Supreme Court of the State, shows very plainly that its purpose is not to regulate wages or hours of labor, either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are the subjects of a controversy the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continuity of operation and production." [8]

Then follows a repetition and re-affirmation of the previously-decreed objections to compulsory arbitration, and the conclusion:

> "The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration, and has no separate purpose. It was exerted by the state agency as a part of that system, and

[7] 267 U. S. 552, 45 Sup. Ct. 441 (1925), considered in Minor Bronaugh, *Compulsory Arbitration of Wages and Hours of Labor—End of Kansas Industrial Relations,* 29 LAW NOTES 28; and notes in 24 MICH. L. REV. 59 and 34 YALE L. J. 909. The case is also considered in some of the articles listed in note 4, *supra.*

[8] 267 U. S. 552, 565 (1925).

the state court sustained its exertion as such. As a part of the system, it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done." [9]

The invalidity of the provisions for compulsory arbitration in the food industry was held to extend also to mining in *Dorchy* v. *Kansas*.[10] The specific provision here involved was the one forbidding any officer of a union to use his power to influence any other person to violate any provision of the statute or valid order of the court. Mr. Dorchy had been prosecuted for calling a strike and his conviction had been sustained by the state court prior to the decision of the Supreme Court in the *Wolff Packing Company* case. Without deciding whether the Dorchy conviction was constitutionally justifiable, the Supreme Court sent the case back to the state court for its determination whether this part of the statute was separable or inseparable from the main part held unconstitutional by the Supreme Court. What Kansas tried to do with its Court of Industrial Relations Act is set forth by Mr. Justice Brandeis as follows:

"* * * The purpose of the statute is to insure continuity of operation in coal mining and other businesses declared to be affected with a public interest. The means provided for accomplishing this is a system of compulsory arbitration of industrial disputes. The instrument is the so-called industrial court. Upon it is conferred power to investigate all matters involved in such controversies; to make findings thereon; to issue such orders as it may deem needful, fixing the wages to be paid, the hours of work, the rules for work, and the working and living conditions. The provisions in aid of the enforcement of this system are both comprehensive and detailed. The employer is prohibited, among other things, from limiting or ceasing operations with a view to defeating the purpose of the statute. Likewise every association of persons (e. g., trade unions) is prohibited from acting to that end. In effect, strikes and lockouts, the boycott and picketing, are made unlawful. Any person violating any provision of the stat-

[9] *Ibid.*, 569.

[10] 264 U. S. 286, 44 Sup. Ct. 323 (1923), considered in 13 CALIF. L. REV. 81.

ute, or any order of the so-called court, is declared guilty of a misdemeanor. * * *" [11]

When the *Dorchy* case got back to the state court, it was held that the provisions forbidding the calling a strike were separable from the compulsory-arbitration features of the Industrial Court Act and the conviction of Mr. Dorchy was again affirmed by the Kansas court. This came to the Supreme Court again in *Dorchy* v. *Kansas*[12] and was affirmed. For a

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[11] 264 U. S. 286, 288 (1923).

[12] 272 U. S. 306, 47 Sup. Ct. 86 (1926), commented on in 40 HARV. L. REV. 626; 21 ILL. L. REV. 727; 5 No. CAR. L. REV. 244; and 75 U. PA. L. REV. 268. In the Lawyers' Edition of the Supreme Court Reports, volume 71, pages 248-268, is an extended note on "Purposes for which Strike May Lawfully be Called."

On legal issues arising out of strikes, see Marjorie K. Baumgartner, *The Thirteenth Amendment and Strikes on Public Utilities,* 6 BI-MONTHLY L. REV. 109; Walter B. Kennedy, *Law and the Railroad Labor Problem,* 32 YALE L. J. 553; Alpheus T. Mason, *The Right to Strike,* 77 U. PA. L. REV. 52; P. A. Pare, *The Right to Enforced Labor Notwithstanding the Thirteenth Amendment,* 7 BI-MONTHLY L. REV. 4; Moorfield Storey, *The Right to Strike,* 32 YALE L. J. 99; George Jarvis Thompson, *Labor and the Law in the Public Utility Field,* 21 MICH. L. REV. 1; and notes in 9 BOST. U. L. REV. 280, on right of union to strike; in 39 HARV. L. REV. 101, 128, on strike to enforce award of arbitration tribunal; in 25 ILL. L. REV. 93, on strengthening union as justification for strike; in 78 U. PA. L. REV. 430, on injunction against strike; in 15 VA. L. REV. 278, on strike to compel employment of union labor; in 32 YALE L. J. 157, on "Developing Ethics" and the "Right to Strike;" in 32 YALE L. J. 166, on the injunction in the railway strike; in 37 YALE L. J. 526, on legality of strike to enforce performance of agreement to give preference to union labor; and in 39 YALE L. J. 914, on injunction against secondary strikes.

For discussion prior to 1922 on power to forbid strikes in employments other than those clearly private, see Arthur A. Ballantine, *Railway Strikes and the Constitution,* 17 COLUM. L. REV. 502; S. H. Kauffman, *Limiting the Right to Strike,* 84 CENT. L. J. 121; Blewett Lee, *The Thirteenth Amendment and the General Railway Strike,* 4 VA. L. REV. 437; Philip Wager Lowry, *Strikes and the Law,* 21 COLUM. L. REV. 783; O. R. McGuire, *The Injunction and the Railroad Strike,* 11 GEORGETOWN L. J. 1; Thomas I. Parkinson, *Constitutional Aspects of Compulsory Arbitration,* 7 PROC. ACAD. POL. SCI. (N. Y.) 44, in No. 1 of Vol. VII, entitled "Labor Disputes and Public Service Corporations"; Thomas A. Sherwood, *An Inquiry into the Power of the State to Afford Relief in a Certain Emergency* (coal strike), 37 AMER. L. REV. 545; and notes on injunction against a coal strike, in 35 HARV. L. REV. 459, 474; 20 MICH. L. REV. 548; and 34 W. VA. L. Q. 176; and on injunctions against railway strikes, in 37 AMER. L. REV. 285, 461; 56 CENT. L. J. 201, 301; and 16 HARV. L. REV. 518, 524.

unanimous court Mr. Justice Brandeis pointed out that the Supreme Court is bound by the decision of the state court that the anti-strike feature of the statute is separable from the rest, but that the question for decision is not the broad one whether the legislature may forbid all strikes but the narrow one whether it may forbid such a particular strike as that which Mr. Dorchy called in order to compel the employer to pay to one of the members of the union a two-year-old disputed claim. In sanctioning this power he said:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. * * * To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. * * * And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. * * *" [13]

[13] 272 U. S. 306, 311 (1926).

For discussions prior to 1922 of the legality of strikes, liabilities for strikes, and the issue of injunctions against strikes, see James Wallace Bryan, *Injunctions Against Strikes,* 40 AMER. L. REV. 42; F. C. Connell, *Injunctions Against Strikes, Boycotts, and Similar Unlawful Acts,* 65 CENT. L. J. 273; P. L. Edwards, *Labor Strikes and Injunctions,* 67 ALBANY L. J. 209 and 59 CENT. L. J. 23; Harry G. Kyle, *Labor Organizations—The Right to Control the Price of Labor—The Right to Strike,* 51 CENT. L. J. 301; W. A. Martin, *Right of Labor Union to Compel Members to Aid in Strike by Imposing or Threatening to Impose Penalties,* 21 GREEN BAG 445; W. W. Thornton, *Injunction Against Strikes or Boycotts,* 55 CENT. L. J. 163; and notes in 61 CENT. L. J. 421; 13 COLUM. L. REV. 66, 79; 17 COLUM. L. REV. 174; 7 CORNELL L. Q. 61; 10 GEORGETOWN L. J. (No. 2) 119; 14 HARV. L. REV. 219; 17 HARV. L. REV. 135, 140, 285; 18 HARV. L. REV. 471; 19 HARV. L. REV. 68; 20 HARV. L. REV. 243; 21 HARV. L. REV. 635; 22 HARV. L. REV. 234; 26 HARV. L. REV. 259, 277; 7 ILL. L. REV. 320, 333; 8 ILL. L. REV. 126; 6 LAW NOTES 19; 7 LAW NOTES 23; 16 LAW NOTES 168; 10 MICH. L. REV. 637; 15 MICH. L. REV. 673; 16 MICH. L. REV. 57, 137; 59 U. PA. L. REV. 340; 64 U. PA.

For other indication of Supreme Court views on the proper scope and limits of governmental interference in labor disputes, one must go to cases interpreting and applying federal statutes.[14] Cases holding that the Sherman Law is not applicable because the commerce involved is not interstate or because the restraint in issue is not unreasonable may be put to one side as affording little light on the limits of legislative power. When, however, the Sherman Law is applied to restrain activities of employers or employees in industrial quarrels, it is a safe assumption that state legislation authorizing such interference would be sustained as constitutional. Of such applications the most notable is *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*[15] which directed the issue of an injunction against a per-

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L. REV. 849; 18 YALE L. J. 425; 20 YALE L. J. 216; 28 YALE L. J. 707; and 31 YALE L. J. 320.

For a discussion of "Strike Injunctions Obtained by the United States," see Zechariah Chafee, Jr., THE INQUIRING MIND (New York; Harcourt, Brace and Company, 1928), pages 198-216. This is preceded by a section on "Strike Injunctions Obtained by Coal Operators" (pages 190-197).

[14] For comparison of work in statutory interpretation with work in constitutional law, see Duplex Printing Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921), and American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921), interpreting the Clayton Act, with Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921), declaring unconstitutional an Arizona statute closely resembling the Clayton Act. On the Duplex Case, see Alpheus T. Mason, *The Labor Clauses of the Clayton Act,* 18 AM. POL. SCI. REV. 489; and notes in 21 COLUM. L. REV. 258; 19 MICH. L. REV. 628; and 1 WIS. L. REV. 187. On the Steel Foundries Case, see notes in 10 GEORGETOWN L. J. (No. 3) 94; 6 MINN. L. REV. 252; 70 U. PA. L. REV. 102; 8 VA. L. REV. 298; and 31 YALE L. J. 408. The effect of the Clayton Act on power to issue an injunction against a railway strike is considered in 8 MINN. L. REV. 345. For discussion of the provisions of the Clayton Act, published prior to Supreme Court decisions, see Daniel Davenport, *An Analysis of the Labor Sections of the Clayton Anti-trust Bill,* 80 CENT. L. J. 46; William Howard Taft, in *Address of the President,* 39 REP. AM. BAR ASS'N 359, 371-380; Edwin E. Witte, *The Doctrine that Labor is a Commodity,* 69 ANN. AMER. ACAD. POL. AND SOC. SCI. (No. 158) 133; and notes in 30 HARV. L. REV. 632 and 66 U. PA. L. REV. 267. For discussion of Truax v. Corrigan, see Everett P. Wheeler, *Injunctions in Labor Disputes and Decisions of Industrial Tribunals,* 8 A. B. A. JOUR. 506; and notes in 2 BOST. U. L. REV. 124; 10 CALIF. L. REV. 237; 22 COLUM. L. REV. 252; 7 CORNELL L. Q. 251; 20 MICH. L. REV. 657; 8 VA. L. REV. 374, 28 W. VA. L. Q. 144; and 31 YALE L. J. 408. On similar problems, see notes in 16 COLUM. L. REV. 683; 30 HARV. L. REV. 75, 85; and 16 LAW NOTES 73.

[15] 274 U. S. 37, 47 Sup. Ct. 522 (1927), considered in Alexander B. Royce,

fectly peaceful boycott by which members of a union declined to cut, carve or fit stone cut in another state by employees working in opposition to their union. In a dissenting opinion in which Mr. Justice Holmes concurred, Mr. Justice Brandeis pointed out that the boycotters confined themselves to their own refusal to work and he insisted that the resulting restraint should be deemed a reasonable mode of self-protection and therefore not obnoxious to the Sherman Law. Justices Sanford and Stone concurred with the majority solely because of what they deemed an earlier controlling precedent.[16]

Labor, The Federal Anti-Trust Laws, and the Supreme Court, 5 N. Y. UNIV. L. REV. 19; Edwin E. Witte, *The Journeymen Stonecutters' Decision and Other Recent Decisions Against Organized Labor,* 17 AM. LAB. LEGIS. REV. 139; and notes in 40 HARV. L. REV. 1154; 22 ILL. L. REV. 444; 26 MICH. L. REV. 198; 3 NOTRE DAME LAW. 104; 1 ST. JOHNS L. REV. 189, 213; 1 U. CIN. L. REV. 497; 13 VA. L. REG. [N. S.] 687; 14 VA. L. REV. 112, 132; 4 WIS. L. REV. 250; and 37 YALE L. J. 84. For other discussion of boycotts and injunctions against them, see notes in 23 COLUM. L. REV. 578; 6 ILL. L. Q. 225; 10 IOWA L. REV. 79; 21 MICH. L. REV. 786; 13 MINN. L. REV. 614; and 34 YALE L. J. 897. For earlier consideration of boycotting, see James Wallace Bryan, *Injunctions Against Boycotts and Other Illegal Acts,* 40 AMER. L. REV. 196; Frederick H. Cooke, *Solidarity of Interests as a Basis of Legality of Boycotting,* 11 YALE L. J. 153; Charles R. Darling, *The Law of Strikes and Boycotts,* 52 AMER. L. REG. (Now U. PA. L. REV.) 73; Howard C. Joyce, *Boycotts,* 74 CENT. L. J. 263; Jerome C. Knowlton, *Labor Organizations in Legislation,* 6 MICH. L. REV. 609; Robert L. McWilliams, *Evolution of the Law Relating to Boycott,* 41 AMER. L. REV. 336; Theodor Negaarden, *The Danbury Hatters Case—Its Possible Effect on Labor Unions,* 49 AMER. L. REV. 417; Seymour D. Thompson, *Injunctions Against Boycotting,* 34 AMER. L. REV. 151; and notes in 42 AMER. L. REV. 315, 518; 8 COLUM. L. REV. 413; 14 COLUM. L. REV. 532; 20 COLUM. L. REV. 882; 1 CORNELL L. Q. 133; 3 CORNELL L. Q. 75; 15 HARV. L. REV. 223; 17 HARV. L. REV. 139; 21 HARV. L. REV. 450; 22 HARV. L. REV. 458; 27 HARV. L. REV. 478, 497; 29 HARV. L. REV. 86; 4 MICH. L. REV. 143; 5 MICH. L. REV. 389; 1 MINN. L. REV. 437; 56 U. PA. L. REV. 339; 63 U. PA. L. REV. 113; 17 YALE L. J. 616; and 27 YALE L. J. 539, 569.

[16] On the lawfulness or unlawfulness of various forms of picketing and the issue of injunctions against them, see notes in 98 CENT. L. J. 37; 99 CENT. L. J. 383; 27 COLUM. L. REV. 190; 12 CORNELL L. Q. 226; 13 CORNELL L. Q. 11 (enjoining picketing when no strike in progress); 11 GEORGETOWN L. J. (No. 1) 52; 37 HARV. L. REV. 389 (refusal of employer to arbitrate is no ground for depriving him of injunction against picketing employees); 40 HARV. L. REV. 896; 43 HARV. L. REV. 965 (injunction against lawful acts interwoven with unlawful plan); 10 IOWA L. REV. 79; 21 MICH. L. REV. 786; 2 ST. JOHNS L. REV. 78; 1 TEMP. L. Q. 49; 5 WASH. L. REV. 126; 4 WIS. L. REV. 308; 36 YALE L. J. 557; and 37 YALE L. J. 249. For earlier discussion

A boycott of non-union materials accomplished through agreements between contractors and union employees not to purchase or work on such materials came before the court in *United States* v. *Brims*[17] in which a unanimous vote reversed the Circuit Court of Appeals on the issue of interstate commerce. While the opinion of Mr. Justice McReynolds does not discuss the lawfulness of the restraint under the Sherman Law, but sends the case back for determination on this point, it seems to be a fair inference that the court would not rule that interstate commerce was directly affected if it thought that the conviction would later have to be reversed on the ground that the restraint was reasonable.[18]

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of picketing, see references listed in footnote 14, *supra,* and notes in 51 AMER. L. REG. 703; 52 AMER. L. REG. 531; 7 CALIF. L. REV. 276; 10 CALIF. L. REV. 82; 53 CENT. L. J. 301; 6 COLUM. L. REV. 124; 18 COLUM. L. REV. 372; 21 COLUM. L. REV. 103; 15 HARV. L. REV. 482; 18 HARV. L. REV. 471; 24 HARV. L. REV. 504; 5 MICH. L. REV. 712; 15 MICH. L. REV. 671; 20 MICH. L. REV. 242; 1 MINN. L. REV. 437; 64 U. PA. L. REV. 849; 17 YALE L. J. 623; and 28 YALE L. J. 200, 707.

[17] 272 U. S. 549, 47 Sup. Ct. 169 (1926).

[18] On the issue of injunctions in labor disputes and legislative control thereover, see references in note 14, *supra,* and Paul F. Brissenden and C. O. Swayze, *The Use of the Labor Injunction in the New York Needle Trade,* 44 POL. SCI. Q. 548 and 45 POL. SCI. Q. 87; Walter Carrington, *Injunctions in Labor Controversies,* 8 VA. L. REG. [N. S.] 401; J. P. Chamberlain, *The Legislature and Labor Injunctions,* 11 A. B. A. JOUR. 815; Paul Donovan, *Legislation Affecting Labor Injunctions,* 16 A. B. A. JOUR. 561; Felix Frankfurter and Nathan Greene, *Legislation Affecting Labor Injunctions,* 38 YALE L. J. 879; *Labor Injunctions and Federal Legislation,* 42 HARV. L. REV. 766; and *Congressional Power over the Labor Injunction,* 31 COLUM. L. REV. 385; Louis P. Goldberg, *Recent Decisions in Industrial Disputes,* 6 N. Y. UNIV. L. REV. 1; Robert Kingsley, *Labor Injunctions in Illinois,* 23 ILL. L. REV. 529; Alpheus T. Mason, *Organized Labor as Party Plaintiff in Injunction Cases,* 30 COLUM. L. REV. 466; Thomas Reed Powell, *The Supreme Court's Control over the Issue of Injunctions in Labor Disputes,* 13 PROC. ACAD. POL. SCI. (N. Y.) 37; Edwin E. Witte, *Social Consequences of Injunctions in Labor Disputes,* 24 ILL. L. REV. 772; *Labor's Resort to Injunctions,* 39 YALE L. J. 374; and *New Developments in Labor Injunctions,* 19 AM. LAB. LEGIS. REV. 308; and notes in 41 HARV. L. REV. 909, on mode of proof in hearing on motions for temporary injunctions in federal courts; in 43 HARV. L. REV. 1120, on doctrine of unclean hands in labor controversies; in 22 ILL. L. REV. 888, on Illinois statute restricting injunctions in labor disputes; in 32 LAW NOTES 1, on pending legislation in Congress restricting issue of injunctions; in 23 MICH. L. REV. 52, on nebulous injunctions; in 73 U. PA. L. REV. 185, on injunction to restrain criminal acts; in 34 W. VA. L. Q. 176, on injunction against coal strike; and in 33 YALE L. J. 215, on enjoining barber from dis-

A strike accompanied by violence and destruction of property was the basis for the action for damages predicated on violation of the Sherman Law which came before the court for the second time in *Coronado Coal Co.* v. *United Mine Workers of America*[19] in which the unanimous holding was that there was sufficient evidence to go to the jury on the question whether the conceded restraint was sufficiently directed against interstate commerce as contrasted with restraint confined to production. In neither this nor the earlier decision was there any doubt in the minds of the justices as to the illegal quality of the restraint under the Sherman Law, provided the effect on interstate commerce was sufficiently direct.[20]

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playing sign "No Scabs Here." On injunctions to protect interests of employees, see notes in 30 COLUM. L. REV. 410 and 43 HARV. L. REV. 1158, on injunction against employer to enforce agreement to employ only union labor; in 2 DAK. L. REV. 454, on injunction by employee against employer and third parties; and in 13 MINN. L. REV. 612, on enjoining citizens' committee from coercing employers not to hire union members.

[19] 268 U. S. 295, 45 Sup. Ct. 551 (1925), discussed in 74 U. PA. L. REV. 321 and 35 YALE L. J. 111. The earlier case is United Mine Workers v. Coronado Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922), which is considered in Anonymous, *The Coronado Mine Decision,* 6 CONST. REV. 170; Marjorie Jean Bonney, *Federal Intervention in Labor Disputes,* 4 MINN. L. REV. 467, 550; James B. McDonough, *Liability of an Unincorporated Union under the Sherman Law,* 10 VA. L. REV. 304; W. Lewis Roberts, *Labor Unions, Corporations—The Coronado Case,* 5 ILL. L. Q. 200; W. A. Shumaker, *The Coronado Coal Case,* 26 LAW NOTES, 105; Wesley A. Sturges, *Unincorporated Associations as Parties to Actions,* 33 YALE L. J. 406; and notes in 10 CALIF. L. REV. 506; 22 COLUM. L. REV. 684; 11 GEORGETOWN L. J. 68; 5 ILL. L. Q. 126; 1 TEX. L. REV. 114; 9 VA. L. REV. 52; 2 WIS. L. REV. 51; and 32 YALE L. J. 564. Much of the discussion in the articles and notes cited is concerned with the ruling that unincorporated labor associations are subject to suits for damages under the Sherman Law. For treatment of this issue prior to the Supreme Court decision, see notes in 30 HARV. L. REV. 263, 297, and 2 ST. LOUIS L. REV. 122.

[20] On contracts between employer and employee restricting the latter's freedom to become or remain a member of a labor union, and on the effect of such contracts on the rights of others to solicit employees to join a union, see Homer F. Carey and Herman Oliphant, *The Present Status of the Hitchman Case,* 29 COLUM. L. REV. 441; Charles E. Carpenter, *Interference with Contract Relations,* 41 HARV. L. REV. 728, reprinted in 7 OREG. L. REV. 181, 301; Francis Bowes Sayre, *Inducing Breach of Contract,* 36 HARV. L. REV. 663; and notes in 4 BOST. U. L. REV. 201; 99 CENT. L. J. 219; 13 CORNELL L. Q. 447; 36 HARV. L. REV. 349; 41 HARV. L. REV. 770; 34 LAW NOTES 24; 22 MICH. L. REV. 376; 12 MINN. L. REV. 81, 666; 2 ST. JOHNS L. REV. 218; 71 U. PA. L. REV. 138; 73 U. PA. L. REV. 211; 32 YALE L. J. 171; and

A rare if not sole instance of the successful invocation of the provisions of the Sherman and Clayton Acts by employees against an association of employers appears in *Anderson* v. *Shipowners' Association*[21] in which a bill for an injunction was held to state a cause of action. The allegations were that ship owners controlling substantially all of the vessels of American registry plying between Pacific ports and foreign countries had formed an association to which was given complete control of the employment of seamen on ships of the constituent members. The practices of the association were alleged to include prescription of wages, requirements as to acceptance of employment or loss of all other opportunity, designation of particular positions which applicants were to fill, and exclusion of all not having a certificate from the association.

By two different statutes Congress has endeavored to promote arbitration between railroads and their employees with respect to disputes over wages and other conditions of employment. The Transportation Act provided for decrees by the Railroad Labor Board but with no obligation on the part of any one to obey the decrees. The absence of any such obligation was held in *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board*[22] to deprive the carrier of constitutional grounds of complaint against the action of the Board in designating the representatives of the employees whom it would hear in the arbitration proceedings. Other cases held that the statute left the

33 YALE L. J. 440. Issues arising out of such contracts and out of proposals to end or to restrict their enforcability are dealt with in a number of the articles and notes listed in notes 2, 3, 12, and 18, *supra.*

On contracts to employ only union members or to give preference to union members, see notes in 30 COLUM. L. REV. 410; 36 HARV. L. REV. 890; 43 HARV. L. REV. 1158; 3 TEMP. L. Q. 421; 2 WIS. L. REV. 369; and 37 YALE L. J. 526.

On contracts between employee and labor union binding former for two years not to work in non-union shop, see Horace Stern, *A New Legal Problem in the Relations of Capital and Labor,* 74 U. PA. L. REV. 523. On other labor contracts, see Ralph T. Fuchs, *Collective Labor Agreements in American Law,* 10 ST. LOUIS L. REV. 1; and *Collective Labor Agreements in German Law,* 15 ST. LOUIS L. REV. 1.

[21] 272 U. S. 359, 47 Sup. Ct. 125 (1926), noticed in 36 YALE L. J. 578.

[22] 261 U. S. 72, 43 Sup. Ct. 278 (1923), discussed in 2 WIS. L. REV. 500. In 25 COLUM. L. REV. 822 is a note on the legislative provision construed in the case.

carriers free to disregard the so-called orders of the Labor Board and to choose their own methods of selecting representatives of employees with whom they would confer regarding wages and other conditions of employment.[23] Thereafter Congress passed the Railway Labor Act which provided for voluntary arbitration proceedings but made the award in such proceedings conclusive upon the parties as to the merits and facts of the controversy submitted. This Act provided further that "representatives, for the purposes of this Act, shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." In enforcement of this provision, *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*[24] sustained an injunction which in effect forbade the carrier to coerce employees to negotiate through a newly fostered company union instead of through the Brotherhood to which many of them belonged. In affirming the constitutionality of the statute, Mr. Chief Justice Hughes declared:

> "* * * The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. * * * Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom

[23] Pennsylvania Railroad System, etc. v. Pennsylvania Railroad Co., 267 U. S. 203, 45 Sup. Ct. 307 (1925); Pennsylvania Brotherhood v. Pennsylvania Railroad Co., 267 U. S. 219, 45 Sup. Ct. 312 (1925). On these cases or problems related to them, see notes in 22 COLUM. L. REV. 682, and 38 HARV. L. REV. 374, 402, 986. These cases are reviewed more at length in Thomas Reed Powell, *Commerce, Congress, and the Supreme Court, 1922-1925,* 26 COLUM. L. REV. 396, 409-412. Later in the same review, at pages 538-547, is a presentation of the cases involving the application of the Sherman Law to labor controversies from 1922 to 1925.

[24] 281 U. S. 548, 50 Sup. Ct. 427 (1930), discussed in 25 ILL. L. REV. 310; 29 MICH. L. REV. 789; 37 W. VA. L. Q. 101; and 40 YALE L. J. 92. On the statute, see J. P. Chamberlain, *The Railroad Labor Act,* 12 A. B. A. JOUR. 633; and a note in 42 HARV. L. REV. 108.

of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both. The petitioners invoke the principle declared in *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of the employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." [25]

The validity of a New York statute forbidding night work for women in restaurants between ten o'clock in the evening and six o'clock in the morning was affirmed in *Radice* v. *New York* [26] on the general ground that the court was unable to say that the judgment of the legislature was clearly unfounded. On the issue of discrimination because the statute applied only to cities of the first and second class and also made an exception excluding singers and performers and attendants in cloak rooms, Mr. Justice

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[25] 281 U. S. 548, 570-571 (1930).

[26] 264 U. S. 292, 44 Sup. Ct. 325 (1925), noticed in 13 CALIF. L. REV. 82 and 19 ILL. L. REV. 100.

On other regulation of periods of labor, see notes in 2 DAK. L. REV. 399, on discrimination in exemption of women in telephone exchanges and in non-application to towns of less than five hundred population; in 25 COLUM. L. REV. 669, on six-day statute declared void for discrimination; in 30 LAW NOTES 63, on regulation of closing hours; and in 8 OREGON L. REV. 208, on eight and one-half hour day for women.

On other matters, see notes in 25 COLUM. L. REV. 814, on legal aspects of convict labor; in 7 TENN. L. REV. 210, on requiring mine operators to furnish shower baths; and in 16 VA. L. REV. 618, on prohibiting assignment of wages.

Prudential Insurance Co. v. Cheek, 259 U. S. 530, 42 Sup. Ct. 517 (1922), which sustained a statute requiring corporations to give employees quitting service a letter stating the character of the services rendered and the reason for their termination, is the subject of comment in 3 BOST. U. L. REV. 30; 8 CORNELL L. Q. 48; 36 HARV. L. REV. 195, 216; 71 U. PA. L. REV. 79; and 9 VA. L. REV. 138, 292.

Sutherland found the classification reasonable and hence not obnoxious to the equal-protection clause.

A statute of Kentucky forbidding and penalizing the employment on any railroad of any person under sixteen years of age was adduced in *Chesapeake & Ohio R. Co.* v. *Stapleton*[27] on an issue of the absence of proof of negligence under the Federal Employers' Liability Law. While it was held that violation of the statute was not a substitute for proof of negligence, Mr. Chief Justice Taft declared that it goes without saying that the state has power to forbid and penalize such employment. The boy in question was between fifteen and sixteen years of age, was large and well-developed and had been working as a section hand and water carrier for nine months.

Statutes of Arizona and Arkansas imposing minimum standards for wages of women in various employments were declared unconstitutional in two memorandum opinions[28] on the authority of *Adkins* v. *Children's Hospital*[29] which annulled the Act

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[27] 279 U. S. 587, 49 Sup. Ct. 442 (1929).

On protective legislation, see W. A. Shumaker, *State Child Labor Laws*, 26 LAW NOTES 185; and *Statutes for the Protection of Women*, 26 LAW NOTES 164.

[28] Murphy v. Sardell, 269 U. S. 530, 46 Sup. Ct. 22 (1925); Donham v. West-Nelson Manufacturing Co., 273 U. S. 657, 47 Sup. Ct. 343 (1927). In both cases Mr. Justice Brandeis dissents. In the Murphy case, Mr. Justice Holmes announces that he concurs solely because he feels himself bound by the Adkins case.

[29] 261 U. S. 525, 43 Sup. Ct. 394 (1923), discussed in Anonymous, *Minimum Wage Laws*, 8 CONST. REV. 174; Irene Osgood Andrews, *Status of Minimum Wage Legislation in the United States*, 15 AM. LAB. LEGIS. REV. 298; Minor Bronaugh, *Minimum Wage Laws*, 27 LAW NOTES 28; Harry Cohen, *Minimum Wage Legislation and the Adkins Case*, 2 N. Y. UNIV. L. REV. 48; George W. Goble, *The Minimum Wage Decision*, 12 KY. L. J. 3, reprinted in 58 AMER. L. REV. 423; George Gorham Groat, *Economic Wage and Legal Wage*, 33 YALE L. J. 489; Thomas I. Parkinson, *Minimum Wage and the Constitution*, 13 AM. LAB. LEGIS. REV. 131; Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545; Ira Jewell Williams, *Minimum Wage Laws*, 9 CONST. REV. 195; and notes in 97 CENT. L. J. 147, 399; 11 CALIF. L. REV. 353; 23 COLUM. L. REV. 565; 11 GEORGETOWN L. J. (No. 4) 83; 18 ILL. L. REV. 118; 21 MICH. L. REV. 906; 8 MINN. L. REV. 60; 8 ST. LOUIS L. REV. 263; 2 TEX. L. REV. 99, reprinted in 58 AMER. L. REV. 531; 71 U. PA. L. REV. 360; 9 VA. L. REV. 639; and 32 YALE L. J. 388, 829. Most of these articles and notes, with some others contained in non-technical periodicals, are reprinted in THE SUPREME COURT AND MIN-

of Congress applicable to the District of Columbia. In this leading case, Mr. Justice Brandeis did not sit. Mr. Chief Justice Taft and Justices Holmes and Sanford dissented. The majority consisted of Justices McKenna, Van Devanter, McReynolds, Sutherland and Butler. The first three had sat in a previous case in which the court had divided four to four, with Mr. Justice Brandeis disqualified because he had been of counsel. It is a fairly safe assumption that the other justice against the Oregon statute involved in the earlier case was Mr. Chief Justice White. From this it is to be inferred that if the District of Columbia case had reached the Supreme Court a year earlier, after Mr. Chief Justice White had been succeeded by Mr. Chief Justice Taft, but before Justices Day and Pitney had been succeeded by Justices Sutherland and Butler, there would have been only three justices opposed to it. That case would have reached the Supreme Court

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IMUM WAGE LEGISLATION (New Republic Inc., New York, 1925), xxviii, 287 pp.

For other discussion of minimum-wage legislation, see Philip R. Bangs, *Some Aspects of the Minimum Wage Law,* 2 DAK. L. REV. 472; Rome G. Brown, *Oregon Minimum Wage Cases,* 1 MINN. L. REV. 471; and *Minimum Wage,* 19 LAW NOTES 5; W. Jethro Brown, *Judicial Regulation of Rates of Wage for Women,* 28 YALE L. J. 236; and *Effect of an Increase in the Living Wage by a Court of Industrial Arbitration upon Vested Rights and Duties under Pre-existing Awards,* 32 HARV. L. REV. 892; Henry Bourne Higgins, *A New Province for Law and Order,* 29 HARV. L. REV. 13; 32 HARV. L. REV. 189; Thomas Reed Powell, *The Oregon Minimum Wage Cases,* 32 POL. SCI. Q. 296; and *The Constitutional Issue in Minimum Wage Legislation,* 2 MINN. L. REV. 1; W. M. W. Splawn, *A Review of the Minimum Wage Theory and Practice, with Special Reference to Texas,* 1 SOUTHWESTERN SOC. & POL. Q. 339; Leo Wolman, *Economic Justification for the Legal Minimum Wage,* 14 AM. LAB. LEGIS. REV. 226; and notes in 3 CORNELL L. Q. 43; 11 GEORGETOWN L. J. (No. 2) 63; 28 HARV. L. REV. 89, 105; 31 HARV. L. REV. 1013, 1165; 18 LAW NOTES 183; 20 LAW NOTES 123; 22 LAW NOTES 103; 12 MICH. L. REV. 682; 19 MICH. L. REV. 756; 2 MINN. L. REV. 225; 3 MINN. L. REV. 43; 12 VA. L. REV. 74; 27 YALE L. J. 421; and 28 YALE L. J. On minimum wage for minors, see 38 HARV. L. REV. 980 and 9 MINN. L. REV. 281. Other minimum-wage prescriptions are considered in R. M. Benjamin, *Power of State Legislature to Fix the Minimum Amount of Wages to Coal Miners,* 6 LAW NOTES 120 and 64 ALBANY L. J. 349; O. H. Myrick, *Statutory Regulation of Wages,* 65 CENT. L. J. 468; and notes on power to fix minimum wage of coal miners, in 55 CENT. L. J. 241; on minimum wage on public works when cost is charged to abutter, in 11 MICH. L. REV. 82 and 12 MICH. L. REV. 403; and on power under Massachusetts statute to compel papers to print notices of commissioner's findings, in 24 COLUM. L. REV. 793.

a year earlier, had there not been a delay due to a rehearing in the Court of Appeals of the District. The rehearing was obtained by the deciding vote of a Justice who had not sat in the original two-to-one decision of the Court of Appeals sustaining the law. Had he sat originally and joined in a decision annulling the law, it is not likely that he would have voted for a re-hearing. His illness at the first hearing and his subsequent intrusion into the litigation may therefore in any realistic account of constitutional law be regarded as one of the necessary decisive factors in rendering minimum-wage legislation unconstitutional.

This, however, may not render inapposite all reference to the apologetics in the opinion of Mr. Justice Sutherland in the *Adkins* case. This opinion starts with affirming that the court has no substantive power to review and nullify Acts of Congress, but only the judicial duty to determine in controversies whether the law is in conflict with the Constitution. Every possible presumption is in favor of constitutionality, but "if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so." An outline of this indubitable demonstration follows. The law authorizing a commission to prescribe minimum wages equal to the cost of subsistence deprives both employer and employee of freedom of contract. This raises an issue of due process of law. While the right to freedom of contract is not absolute, such freedom is the constitutional rule, and restraint the constitutional exception to be justified only by exceptional circumstances. The minimum-wage law differs from other laws that have been upheld. It is not confined to a business affected with a public interest. It is not a regulation of contracts for the performance of public work. It is not a law confined to the character, methods and time for payment of wages. It is not a law prescribing limits to hours of labor. It is not passed to meet an emergency, like the Adamson Law and the laws limiting rents. So it is different from the laws that have been sustained. It is rather like a law setting a maximum to the price of groceries according to the needs of individual purchasers, which clearly would be unconstitutional. "The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain."

The chief objection to the statute seems to be that the standard fixed is unrelated to the worth of the employee to the employer. Such a standard of worth, says Mr. Justice Sutherland, would be understandable, but he nowhere tells us how it could be ascertained. The standard of the sum necessary to support the employee has no causal connection with the employer's business since the need to live arises outside of the employment. The employer does not cause this need to live, and to the extent that he pays anything, he relieves the poverty of the employee. While the law takes account of the necessities of the employee, it is one-sided because of failure to take account of the necessities of the employer. It cannot be sustained because of the special characteristics of women, because since the Nineteenth Amendment, the differences between men and women other than physical have almost reached the vanishing point. As a law to prevent immorality, there is no ground for distinction between women and men, because "if women require a minimum wage to preserve their morals men require it to preserve their honesty." Opinions adduced in favor of the policy of minimum-wage legislation are proper enough for the consideration of the legislature, "since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads." If public interest could be invoked to justify fixing a minimum wage, it may be invoked to justify a maximum wage. "A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other." To some argument that "legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint," answer is made that "to sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberty of its constituent members."

For the minority, Mr. Chief Justice Taft insists that disputable

questions of political economy are not for the court to decide. The situation of the sweating system in which persons in necessitous circumstances will accept employment on any terms that are offered is well known. "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large." Then follows review of legislation that has been sustained, reference to the special situation of women in industry unaffected by the Nineteenth Amendment, distinctions between minimum wages and maximum wages, and an insistence that the bargain as to wages is not more inviolate than the bargain as to hours. Mr. Justice Holmes urges the same point. "The bargain is equally affected whichever half you regulate." He notes that the statute does not compel anybody to pay anything and observes that "it is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden." The legislation abroad and in several states makes it impossible to hold that reasonable men may not reasonably believe the law to be for the public good. The criterion of constitutionality is not whether the members of the court so believe.

Mr. Justice Sanford joined in the dissenting opinion of Mr. Chief Justice Taft. For the majority Mr. Justice Sutherland cites no precedents against the constitutionality of the law except ones establishing the general position that liberty of contract may claim constitutional protection against unreasonable and arbitrary restraints. He deals with other precedents only for the purpose of showing that they are individually and severally insufficient to sustain the law. He does not consider their possible collective effect, and he does not consider at all the possible precedents of usury laws, workmen's compensation legislation, and

statutes relating to unfair competition and restraint of trade. Workmen's compensation laws in effect add a pension to pay, and while they, like laws relating to modes of determining wages and regulating hours of labor may still leave the employer free to compensate himself by lowering the standard wage scale, it is doubtful whether such compensation has actually been available in the bargaining process. A usury law is a most direct method of forbidding bargains deemed undesirable. Regulation of methods of competition are aimed to prevent the powerful from using their power to secure bargains deemed undesirable. The combined force of these somewhat analogous restrictions that have been sustained is not accurately assessed by the method of distinguishing each of them singly. Quite the most interesting insight into the underlying vein of the majority opinion is to be gained by comparing the acuteness with which it finds significant distinctions between the minimum-wage law and all other laws that have been sustained and the sudden reversal of form which sees no significant distinctions between fixing a minimum wage and fixing a maximum wage, between regulating wages of women and regulating wages of men, and between regulating wages of employees who devote their whole working time to the service of an employer and regulating prices which grocers may charge to casual customers. One may agree with Mr. Justice Sutherland that if by clear and indubitable demonstration a statute be opposed to the Constitution, a court has no choice but to say so, and yet still question whether his opinion affords an appropriate illustration of the minor premise that would be necessary to require the conclusion that the majority professed to feel coerced by the Constitution to reach.

Several cases already considered in preceding sections may be mentioned here for their bearing on industrial relations. The legislation of the Pacific States which prevents ineligible aliens from acquiring any rights approaching an interest in agricultural lands has the effect of keeping such aliens who wish to engage in agriculture in the less desirable position of employees.[30] The

[30] Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15 (1923), Porterfield v. Webb, 263 U. S. 225, 44 Sup. Ct. 21 (1923), Webb v. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112 (1923), Frick v. Webb, 263 U. S. 326, 44 Sup. Ct. 115 (1923), *supra*, pages 123-126.

effort to regulate the fees of employment agencies was very likely prompted by interest in the welfare of employees more than by an acute desire to restrict the profits of the agencies.[31] Legislation to require payment of the prevailing rates of wages to employees engaged in work on public contracts is legislation to regulate industrial relations, though its constitutional basis is the power of the state as proprietor to direct its own concerns. One may suspect that possibly the industrial aspect of such legislation may have influenced some members of the court in holding a particular statute void for indefiniteness.[32]

While the major issues of the constitutionality of workmen's compensation legislation were settled some years ago,[33] there still arise from time to time some minor questions that reach the Supreme Court. The cases, however, are few, as compared with those that end finally in the courts of the several states. A paging of the law reviews reveals numerous comments on the interpretation and application of the various state compensation laws

[31] Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928), *supra,* page 166.

[32] Connally v. General Construction Co., 269 U. S. 385, 46 Sup. Ct. 126 (1926), *supra,* pages 29-30.

[33] On general aspects of Workmen's Compensation Legislation, see William Henry Beatty, *The Alabama Workmen's Compensation Act,* 4 ALA. L. J. 74; Harry Best, *Workmen's Compensation Laws Affecting Injuries to the Eye,* 11 A. B. A. JOUR. 15; William M. Burton, *Workmen's Compensation Law of Nebraska,* 1 OMAHA L. BUL. (No. 1) 1; Jesse Demchak, *The Constitutionality of the Workmen's Compensation Act,* 10 BI-MONTHLY L. REV. 61; Robert S. Marx, *Compulsory Compensation Insurance,* 25 COLUM. L. REV. 164, reprinted in 59 AMER. L. REV. 200; Roy Moreland, *The General Development of Workmen's Compensation Acts,* 13 KY. L. J. 20, 94, 200; Warren H. Pillsbury, *The Power of the Courts to Declare Laws Unconstitutional—A Discussion Based upon Review of Decisions of Constitutional Questions Affecting the Workmen's Compensation Act,* 11 CALIF. L. REV. 313; Kenzo Takayanagi, *Liabiliy without Fault in the Modern Civil and Common Law,* 16 ILL. L. REV. 163, 168; 17 ILL. L. REV. 187, 416; and William H. Wicker and Robert A. McPheters, *Workmen's Compensation in North and South Carolina,* 4 No. CAR. L. REV. 47.

On extra-territorial effect of workmen's compensation laws, see Ralph W. Dwan, *Workmen's Compensation and the Conflict of Laws,* 11 MINN. L. REV. 329, reprinted in 61 AMER. L. REV. 571; and notes in 37 HARV. L. REV. 375, 396; 40 HARV. L. REV. 130; 21 MICH. L. REV. 449; 22 MICH. L. REV. 392; 24 MICH. L. REV. 738; 25 MICH. L. REV. 663; 14 ST. LOUIS L. REV. 205; 1 So. CALIF. L. REV. 274; 4 TULANE L. REV. 289; 16 VA. L. REV. 701; 2 WIS. L. REV. 237; and 34 YALE L. J. 453.

and indicates that the plan of administrative determination of the issues has by no means ended litigation in the courts. Doubtless most of the cases are technically decided on issues of statutory construction, since the words of the statutes are sufficiently general to enable a court to find that they do not cover injuries which constitutional considerations would exclude. Yet when compensation is awarded, a constitutional question can be asked. There is observable a tendency to stretch the conception of accident to make it cover the slow march of disease,[34] and to construe broadly the words "arising out of the employment" and "in course of the employment."

The cases in the Supreme Court are concerned with whether injuries held by state courts to have been suffered in the course of the employment are ones for which compensation may be given consistently with the Fourteenth Amendment, whether payments may be awarded to non-resident alien dependents, whether payments may be required for more general purposes when deceased employees leave no dependents, whether tort-feasors may be compelled to contribute to such general purposes when they have paid to the employee more than he might recover from his employer, whether findings of fact made by a commission may be final as against judicial review, and whether fees of attorneys in compensation proceedings may be limited by law. Among

[34] For discussions of accident and disease, see George E. Beers, *Compensation for Occupational Diseases*, 37 YALE L. J. 579; J. P. Chamberlain, *Workmen's Compensation Legislation for Diseases Due to Employment*, 10 A. B. A. JOUR. 647; Samuel Checkver, *A Suggested Analysis for Treating Disease as Personal Injury by Accident under the Workmen's Compensation Acts*, 14 VA. L. REV. 358; P. W. Viesselman, *Compensation for Diseases Caused by Conditions of Employment*, 2 DAK. L. REV. 337; and notes on occupational diseases, in 20 ILL. L. REV. 317; 13 KY. L. J. 299; 24 MICH. L. REV. 88; and 3 TENN. L. REV. 124; on effect from phosphorus as accident, in 10 CORNELL L. Q. 529; on gas in lungs as occupational injury, in 4 TULANE L. REV. 460; on disease as accidental injury, in 23 MICH. L. REV. 200; on sickness from improper place of work, in 3 NOTRE DAME LAW. 110; on industrial disease held within Compensation Act, in 3 WIS. L. REV. 309; on disease resulting from exposure held not within Act, in 3 TEX. L. REV. 492; on hernia as accident, in 25 COLUM. L. REV. 684 and 38 YALE L. J. 553; on heart failure, in 6 TEX. L. REV. 118 and 13 VA. L. REV. 414; on anthrax held personal injury, in 5 TEX. L. REV. 220; on epileptic fit while on job, in 7 N. Y. UNIV. L. REV. 773; and on aggravation of pre-existing disease, in 12 IOWA L. REV. 100 and 2 ROCKY MT. L. REV. 68.

questions mooted in state courts are whether various employers are subject to the compensation law,[35] whether the injured person was an employee at all or an employee of the particular person from whom compensation is sought,[36] whether the employee is disentitled to compensation because of some fault made a bar to recovery,[37] and whether the employer is subject to special burdens because of his violation of some statutory requirement.[38]

[35] On issues which depend on the peculiarities of the employer, see notes in 5 TEX. L. REV. 300 and 6 TEX. L. REV. 405, on whether cities come within the Act; in 14 IOWA L. REV. 105, on case holding township not an employer within the Act; in 4 BOST. U. L. REV. 63, on whether policemen are "employees;" in 12 MARQ. L. REV. 247, on whether township road superintendent may recover from township; in 9 MARQ. L. REV. 120, on employee of national guard; in 1 So. CALIF. L. REV. 398, on election officer injured while bringing water to fainting co-worker; in 2 WIS. L. REV. 305, on citizen working out road tax; and in 13 CALIF. L. REV. 263, on liability of religious societies.

[36] On what employees may claim compensation and from whom, see Francis H. Bohlen, *Casual Employment and Employment Outside of Business,* 11 CALIF. L. REV. 221; and notes on casual employment, in 3 IND. L. J. 326; 10 MINN. L. REV. 626; and 4 TULANE L. REV. 307; on whether one is employee or independent contractor, in 22 MICH. L. REV. 390 and 12 MINN. L. REV. 83; on employee of independent contractor, in 26 MICH. L. REV. 938 and 3 WIS. L. REV. 121; on general and special employment, in 11 CALIF. L. REV. 291; on concurrent employments, in 26 COLUM. L. REV. 1044; on liability of co-employer, in 11 MINN. L. REV. 81; on loan of servant of one employer to another employer, in 2 TEMP. L. Q. 290; on liability of one temporarily controlling another's employee, in 3 TEMP. L. Q. 336; on computation of award when one is killed during temporary employment, in 35 YALE L. J. 769; on apportionment of compensation in case of concurrent and successive employment, in 11 CALIF. L. REV. 213; on working partner receiving wages, in 22 COLUM. L. REV. 685; 10 VA. L. REV. 466; and 39 YALE L. J. 1074; on majority stockholder as employee, in 3 WIS. L. REV. 444, reprinted in 60 AMER. L. REV. 755; on discharged employee assisting successor, in 13 VA. L. REV. 580; on minor illegally employed, in 9 BOST. U. L. REV. 308 and 36 YALE L. J. 151; on registration of employee, in 17 KY. L. J. 407; on who is employee, in 5 TEX. L. REV. 219; and on one working for some one else than one's employer, in 20 ILL. L. REV. 518.

[37] On injuries while violating orders of employer, see 2 N. Y. UNIV. L. REV. 170 and 13 VA. L. REV. 135; on doing act prohibited by statute, 6 No. CAR. L. REV. 227; on failure to observe traffic law as wilful misconduct, 8 No. CAR. L. REV. 326; on infant's misrepresentation of age as a defense, 10 CORNELL L. Q. 382.

[38] On provision giving employee option of claiming under Act or suing for damages at common law where employer failed to comply with "lawful requirement", see 23 COLUM. L. REV. 291; 36 HARV. L. REV. 351; 22 MICH. L. REV. 382; and 32 YALE L. J. 291.

The other issues which law review editors have discovered in state reports are analogous to those considered by the Supreme Court and will be indicated in footnotes attached to the story of the Supreme Court cases.

The extension of a state compensation law to cover a fatal injury to an employee killed by a train at a public crossing as he was riding in the car of a fellow employee while both were on their way to work at the employer's plant was sustained in *Cudahy Packing Co.* v. *Parramore* [39] in view of the facts therein appearing. Mr. Justice Sutherland details them with the following comment:

> "Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at

[39] 263 U. S. 418, 44 Sup. Ct. 153 (1923), discussed in Bolling H. Handy, *Development of Workmen's Compensation Principle,* 10 VA. L. REG. [N. S.] 723; Abraham E. Margolin, *Liability of Employer under Workmen's Compensation Act for Accidents Sustained by Employee on Way to or from Work,* 13 ST. LOUIS L. REV. 77; and notes in 37 HARV. L. REV. 624 and 22 MICH. L. REV. 391. For notes on other cases involving injuries to employees while going to or returning from work, see 24 COLUM. L. REV. 101; 12 GEORGETOWN L. J. 178; 22 ILL. L. REV. 683; 3 IND. L. J. 398; 15 IOWA L. REV. 233; 12 MARQ. L. REV. 172; 21 MICH. L. REV. 823; 8 MINN. L. REV. 553; 12 ST. LOUIS L. REV. 74; 15 VA. L. REV. 789; 2 U. CIN. L. REV. 328; and 33 YALE L. J. 563.

On other injuries outside of actual working hours, see notes on employee being transported to church as part of contract, in 28 MICH. L. REV. 469 and 78 U. PA. L. REV. 442; on injury after hours while in lodging furnished by employer, in 13 CORNELL L. Q. 478 and 2 U. CIN. L. REV. 179; on death by suffocation while occupying room furnished by employer as part of wages, though it was employee's day off, in 5 N. Y. UNIV. L. REV. 191; on fire when employee was sleeping at employer's lodging house, in 37 YALE L. J. 678; on accident while being taken to work in company-owned car which deviated from route, in 14 VA. L. REV. 316; on injury during luncheon hour due to dizziness, in 9 BOST. U. L. REV. 312; on accidents arising during luncheon hour, in 5 ILL. L Q. 120; on injury by shooting in washroom after working hours, in 12 ST. LOUIS L. REV. 76; on fishing during half hour before time to begin work, in 2 WASH. L. REV. 51; on employee met by employer's truck and taken to work, in 8 BOST. U. L. REV. 328; on injury when preparing to leave for home, in 3 TEMP. L. Q. 334; on nail thrown by fellow-employee before beginning work, in 3 NOTRE DAME LAW. 281; on running to fire of home owned by employer, in 6 N. Y. UNIV. L. REV. 213; on employee calling for wife in automobile, in 9 BOST. U. L. REV. 310; on ceasing work for fear of flood, in 28 MICH. L. REV. 218; and on resumption of employment after departure, in 2 DAK. L. REV. 315.

> the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so. And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected. The railroad over which the way extended was not only immediately adjacent to the plant, but, by means of switches, was connected with it, and in principle it was as though upon the actual premises of the employer.
>
> We attach no importance to the fact that the accident happened a few minutes before the time Parramore was to begin work, and was, therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. * * *" [40]

These facts were declared to meet the test that "it is enough if there be a causal connection between the injury and the business * * * a connection substantially contributory, though it need not be the sole or proximate cause." The risk here was an industrial risk as to the employee obliged to use this crossing to

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[40] 263 U. S. 418, 426 (1923).

For discussions of whether the injury is one arising out of the employment or in course of or within the scope of the employment, see notes in 5 ALA. L. J. 67; 2 BOST. U. L. REV. 271; 6 BOST. U. L. REV. 214; 18 CALIF. L. REV. 551; 24 COLUM. L. REV. 327; 37 HARV. L. REV. 781; 18 ILL. L. REV. 254, 402, 490, 572; 19 ILL. L. REV. 104; 21 ILL. L. REV. 295; 24 ILL. L. REV. 715; 2 IND. L. J. 269; 10 MARQ. L. REV. 52; 21 MICH. L. REV. 613; 24 MICH. L. REV. 87; 3 NOTRE DAME LAW. 165; 5 TENN. L. REV. 257; 7 TENN. L. REV. 326; 1 TEX. L. REV. 309; 2 TEX. L. REV. 127; 32 YALE L. J. 416; and 35 YALE L. J. 242.

More specifically see notes on injury while driving car commandeered by policeman, in 17 GEORGETOWN L. J. 271; 42 HARV. L. REV. 713; 24 ILL. L. REV. 913; 3 ST. JOHNS L. REV. 289; 2 SO. CALIF. L. REV. 402; 3 TEMP. L. Q. 229; and 38 YALE L. J. 832; on employee killed while summoned to make arrest, in 14 CORNELL L. Q. 508; on assisting automobile of stranger while driving for employer, in 4 NOTRE DAME LAW. 267; on assisting in repair of car, in 4 TULANE L. REV. 308; on fall from window, in 13 VA. L. REG. [N. S.] 496; on falling out of employer's automobile, in 15 VA. L. REV. 276; on driver of wagon asleep while crossing ferry, in 3 ST. JOHNS L. REV. 144; on what is "plant of employer" in case of street railroad, in 2 WASH. L. REV. 203; and on street hazard, in 38 YALE L. J. 125. For consideration of the source or nature of the injury see note 41, *infra*.

get to his work, even though others for other reasons might be exposed to a like risk. There was dissent by Justices McKenna, McReynolds and Butler, but without opinion. On the general justification for workmen's compensation legislation, Mr. Justice Sutherland declared:

"* * * The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving, of necessity, a field of debatable ground where a good deal must be conceded in favor of forms of legislation calculated to establish new bases of liability more in harmony with these changed conditions. Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. * * * Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern * * * to escape condemnation as arbitrary, capricious, or clearly unreasonable." [41]

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[41] 263 U. S. 418, 423-424 (1923).

On injuries from various causes, see notes on insanity resulting in suicide, in 2 U. CIN. L. REV. 203 and 14 VA. L. REV. 489; on injury or death from heat stroke, in 16 KY. L. J. 254 and 6 TEX. L. REV. 90; on injury by freezing, in 22 ILL. L. REV. 96 and 28 MICH. L. REV. 945; on death or injury by lightning, in 26 MICH. L. REV. 307 and 28 MICH. L. REV. 944; on injury from tornado, in 26 MICH. L. REV. 578 and 27 MICH. L. REV. 837; on injury caused by elements, in 5 WIS. L. REV. 381; on tree blown on automobile, in 15 VA. L. REV. 594; and on earthquake, in 26 MICH. L. REV. 334.

On other injuries questioned as not in the course of employment or arising out of the employment, see notes on injury caused by horseplay, in 2

The court was unanimous in *Bountiful Brick Co.* v. *Giles*[42] in sustaining an award for a death occurring while the employee was also crossing railroad tracks on his way to work, but on this occasion the transit was not on a highway but across a fenced-in portion of the line. It appeared, however, that the journey across the tracks by highway was "long, circuitous and inconvenient" and that the employees to the knowledge of company officials habitually chose the short cut taken by the deceased. Mr. Justice Sutherland referred to the fact that the manager had warned the men to be careful in crossing the tracks at this point and he regarded these warnings as in effect an approval of the use of this avenue of approach.

While non-resident alien dependents of a deceased employee may by statute be excluded from the benefits of a state workmen's compensation plan,[43] it is held in *Madera Sugar Pine Co.* v. *Industrial Accident Commission*[44] that an employer is not denied due process of law by being compelled to make payments to such alien nonresidents. The contention was that the only justi-

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BOST. U. L. REV. 277; 24 COLUM. L. REV. 685; 8 MINN. L. REV. 552; 4 TEX. L. REV. 537; and 5 WIS. L. REV. 169; on nail thrown by fellow employee before beginning work, in 3 NOTRE DAME LAW. 281; on injury in altercation with fellow worker, in 2 IND. L. J. 564 and 4 IND. L. J. 276; on assault by fellow employee, in 38 HARV. L. REV. 533 and 23 ILL. L. REV. 193; on assault by foreman, in 4 TEMP. L. Q. 303 and 16 VA. L. REV. 507; on injury due to assault by third person, in 21 ILL. L. REV. 81; 10 IOWA L. REV. 162; and 23 MICH. L. REV. 201; on injury caused by third party, in 38 HARV. L. REV. 971, 992; on injury by third party actuated by malice, in 14 MINN. L. REV. 827; on death by shooting in hold-up, in 7 BOST. U. L. REV. 79 and 12 ST. LOUIS L. REV. 153; on death caused by strikers, in 72 U. PA. L. REV. 458; and on personal assault on night watchman for purpose of personal robbery, in 28 MICH. L. REV. 219.

[42] 276 U. S. 154, 50 Sup. Ct. 242 (1928), considered in 28 COLUM. L. REV. 671; 23 ILL. L. REV. 729; 7 TEX. L. REV. 185, reprinted in 63 AMER. L. REV. 123; and 3 WIS. L. REV. 170.

[43] Liberato v. Royer, 270 U. S. 535, 46 Sup. Ct. 272 (1926). Here there was no contention that the exclusion of the alien non-residents is opposed to the due process or the equal protection clauses. A treaty with Italy forbade discrimination against nationals in any protection which "establishes a civil responsibility for injuries or for death caused by negligence or fault." This was held not to be applicable to an elective compensation plan under which there was liability without fault.

On the position of aliens under compensation laws, see 11 MINN. L. REV. 84.

[44] 262 U. S. 499, 43 Sup. Ct. 604 (1923), discussed in 3 WIS. L. REV. 170.

fication for compulsory liability without fault is the fact that the state is interested in preventing dependents from becoming public charges and that no such interest is present when the dependents are aliens who live abroad. Mr. Justice Sutherland answered that the constitutionality of the provisions for death benefits is not to be determined independently from the general scope of the compensation plan, and he points out that death benefits as well as other payments are "component parts of a single system of rights and liabilities arising out of the relation of employer and employee." The primary purpose is the protection of the laborer, and the payment to beneficiaries serves this aim no less when they are non-residents.[45]

The requirement in the New York Workmen's Compensation Law that employers or their insurance carrier pay to the state fund $1000 for each fatal injury of an employee who leaves no dependents was unsuccessfully attacked in *Sheehan Company* v. *Shuler*[46] on the special ground that the payments were to be devoted to giving additional compensation to employees who suffer permanent total disability after prior permanent partial disability and to giving like additional compensation to employees who are being rehabilitated under the direction of the state board of vocational education. Since the funds thus raised were devoted to employees without regard to their association with a particular employer, the protestant contended that it denied due process of law to require him to furnish compensation for injuries to

[45] For notes on who are dependents, see 13 CALIF. L. REV. 434; 12 IOWA L. REV. 450; 26 MICH. L. REV. 124; 4 TULANE L. REV. 659; and 35 YALE L. J. 241; on child in institution as dependent, in 7 N. Y. UNIV. L. REV. 539 and 39 YALE L. J. 137; on dependency of children, in 15 CORNELL L. Q. 144; on minor children of mistress as dependents, in 14 VA. L. REV. 665; on dependency of concubine, in 11 IOWA L. REV. 280; on right of common law wife, in 39 YALE L. J. 917; on wife as dependent if married after injury, in 15 CORNELL L. Q. 324; on husband's right to recover for loss of wife's services, in 5 N. Y. UNIV. L. REV. 86; and on recovery by wife for nursing services, in 39 HARV. L. REV. 1105.

[46] 265 U. S. 371, 44 Sup. Ct. 548 (1924), discussed in 19 ILL. L. REV. 288 and 3 WIS. L. REV. 170. On other cases on payments to state when no dependents of deceased employee, see notes in 10 CALIF. L. REV. 528; 12 CALIF. L. REV. 58; 29 COLUM. L. REV. 1011; and 2 So. CALIF. L. REV. 389. In 41 HARV. L. REV. 264 is a consideration of compelling contribution to fund to secure payments to employees of insolvent employer.

those not his own employees. Mr. Justice Sanford adduced the case sanctioning compulsory payments to a state fund from which compensation is paid to employees generally even though no accidents occur in the plant of the contributing employer, and declared it likewise reasonable to relieve particular employers of the direct duty to pay for rehabilitation of their employees and of the obligation to pay for total disability when only the concluding part thereof is caused by injuries in their plants, and to charge this cost to a fund contributed by those whose deceased employees leave no dependents. The payments were declared to be reasonable in amount and not likely to equal the average payment required upon death of an employee leaving compensable dependents.[47] To the complaint of denial of equal protection because the payments were required only of employers who happen to have employees killed without leaving dependents, Mr. Justice Sanford answered that "this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law."

The only difference in the payment required in *New York Street Railways* v. *Schuler*[48] was that it arose under an earlier

[47] For consideration of matters relating to the award in compensation cases, see Joseph A. Gillis, *Constitutionality of Awards Made under the Workmen's Compensation Acts*, 8 BI-MONTHLY L. REV. 179; and notes on "what is the human body worth", in 8 MARQ. L. REV. 185; on pre-existing infirmity as affecting right to recover for total disability, in 7 BOST. U. L. REV. 147; on compensation for loss of second eye as loss of only one eye, in 24 COLUM. L. REV. 554 and 25 COLUM. L. REV. 115; on loss of first eye as cause of ultimate total blindness, in 40 HARV. L. REV. 791; on injury to eye while fighting fire, in 13 VA. L. REV. 241; on total permanent disability, in 21 ILL. L. REV. 740; on indemnity to permanently disabled minor employee, in 12 MARQ. L. REV. 331; on awards for disfigurement in compensation cases, in 6 ILL. L. Q. 231; on compensation to injured workman given light work after mine closed down, in 28 COLUM. L. REV. 253; on apportionment of award, in 11 MINN. L. REV. 288; on surgical services to injured, in 10 CALIF. L. REV. 529; on average weekly wage, in 5 TEX. L. REV. 103; on bonus as earnings, in 10 MINN. L. REV. 353; on what constitutes ability to earn, in 13 MINN. L. REV. 620; on exemplary damages, in 5 TEX. L. REV. 104; on lump sum payment, in 6 BOST. U. L. REV. 284; on computation of lump sum awards, in 3 TEX. L. REV. 211; on double recovery where employee eligible under two Acts, in 6 TEX. L. REV. 404; and on penalty for delay in paying award, in 33 YALE L. J. 657.

[48] 265 U. S. 379, 44 Sup. Ct. 551 (1924).

statute by which the payment of $1000 instead of being divided equally between the two funds was divided $100 to the permanent disability fund and $900 to the rehabilitation fund. The employer whose employee left no dependents had paid his $100 without protest but he contested the $900 demand. Mr. Justice Sanford answered that the amount required is not extravagant and that the difference in the apportionment is not material.

By another provision of the New York statute those who had made this $1000 payment to the state fund on account of fatal accidents for which no direct compensation is due were given a right of action to obtain reimbursement from tort-feasors causing the injury, and this right of action was to be in addition to any cause of action of the representatives of the deceased. This was applied in *Staten Island R. T. R. Co.* v. *Phoenix Indemnity Co.*[49] to allow recovery from a third person who had paid to the

[49] 281 U. S. 98, 51 Sup. Ct. 242 (1930), noticed in 7 N. Y. UNIV. L. REV. 995.

On subrogation of employer or insurance carrier to employee's rights against third party, see 25 COLUM. L. REV. 383, 842, and 34 YALE L. J. 441, 688; on constitutionality of supplemental recovery from tort-feasors, 4 ST. JOHNS L. REV. 108; on right of employer to indemnity, 29 COLUM. L. REV. 1167; on employer's right to reimbursement after employee's release of tort-feasor, 42 HARV. L. REV. 447; on reimbursement of employer by third-party wrongdoer, 39 YALE L. J. 280; and on right of insurer to proceeds of dependent's claim against tort-feasor, 43 HARV. L. REV. 971.

On other collateral matters see notes on tort liability of third persons in position of insurers of compensation, in 40 HARV. L. REV. 917; on liability of fellow-servant for negligence, in 15 CORNELL L. Q. 148; on right of injured employee to sue fellow employee after receiving compensation under Act, in 14 MARQ. L. REV. 239 and 3 TEMP. L. Q. 454; on whether Act excludes common law remedies for injuries not within its scope, in 5 TEX. L. REV. 294; on whether common law action is left for diseases not enumerated in the Act, in 9 MINN. L. REV. 389; on whether dependents have independent cause of action after employee's death, in 12 MINN. L. REV. 770; on recovery under law of two states, in 10 CORNELL L. Q. 364; on double recovery where employee eligible under two Acts, in 6 TEX. L. REV. 404; on whether release by employee is bar to action by beneficiary on death, in 5 TEX. L. REV. 324; on effect of acceptance of award on subsequent action against physician for malpractice, in 28 COLUM. L. REV. 389; on survivability of workman's claim assigned to insurer, in 28 COLUM. L. REV. 389; on survival of unaccrued payments, in 29 COLUM. L. REV. 845; on survival of award for permanent disability, in 11 MINN. L. REV. 578; on whether right to compensation survives to heirs, in 24 COLUM. L. REV. 935; and on minor's right under statute as bar to parent's suit, in 38 HARV. L. REV. 268; 27 MICH. L. REV. 839; and 2 WIS. L. REV. 45.

representative of the deceased more than the amount which would have been awarded against the employer of the deceased. Had this third person settled for less than what might have been awarded against the employer, there would still have been compensation due from the employer and so there could have been no demand for the $1000 payment to the state fund, which now has been paid and is recovered back from the third person. This feature of the situation which caused dissent in the New York Court of Appeals is not adverted to in the due process part of the opinion of Mr. Chief Justice Hughes. The chief contention considered by him is that the third party who caused the death owed no duty to the employer of the deceased and has made full restitution to the widow. To this he answered:

> "* * * The fact of this restitution, however, is an inadequate basis for the conclusion sought. It cannot be said that in providing for the recovery of the loss sustained by the dependents or next of kin of a deceased, the State has exhausted its authority to provide redress for the wrong. The State may permit the recovery of punitive damages in an action by the representatives of the deceased in order to strike effectively at the evil to be prevented. * * * The State might also, if it saw fit, provide for a recovery by the employer for the loss sustained by him by reason of the wrongful act. The wrong may also be regarded as one against the State itself, in depriving the State of the benefit of the life of one owing it allegiance. For this wrong the State might impose a penalty. This is not contested. And it is well settled that the mode in which penalties shall be enforced, and the disposition of the amounts collected are matters of legislative discretion." [50]

Since the duty of the employer and his insurance carrier to make the payment to the state fund is established, and that duty arose out of the death for which the third party was responsible, the employer is no stranger to the wrongful act which caused the death. It is proper, therefore, to compel the wrongdoer to make restitution to the employer. As the state court pointed out, the third party may in the suit against him test the validity of the award paid on behalf of the employer and may show that there could have been no recovery in the action against himself, which

[50] 281 U. S. 98, 106-107 (1929).

he settled. On the issue of discrimination the complaint was that it was improper to select for special treatment those whose victims leave no dependents entitled to compensation for the reason that the dependents have recovered from the tort-feasor more than the amount that would have been awarded against the employer in compensation proceedings against him. To this the answer was that this followed the classification of employers compelled to pay the award for rehabilitation, etc., which had already been approved by the Supreme Court and was not here questioned, and that it operates uniformly against all wrongdoers in like circumstances.

A complaint that due process was denied in the enforcement of a workmen's compensation act because the findings of fact by the commission were deemed to be conclusive if supported by any evidence was held unwarranted in *Booth Fisheries Co.* v. *Industrial Commission*[51] for the reason that the Act in question was

[51] 271 U. S. 208, 46 Sup. Ct. 491 (1926), noticed in 24 ILL. L. REV. 385.

On issues arising from administration of workmen's compensation laws, including problems of judicial review, see E. C. Baird, *Judicial Review of Decisions of the Workmen's Compensation Bureau of North Dakota,* 3 DAK. L. REV. 16; J. Austin Barnes, *Some Legal Problems Incident to Proceedings before the Industrial Accident Board,* 2 TEX. L. REV. 313; Henderson Fowler, *Work of the Texas Industrial Accident Board,* 2 TEX. L. REV. 301; Herbert D. Laube, *Administrative Problems in Wisconsin Workmen's Compensation,* 3 WIS. L. REV. 65; Warren H. Pillsbury, *Applicability of Methods of Trial and Administration Used in Workmen's Compensation Proceedings to Certain Civil Actions,* 18 CALIF. L. REV. 223; Frank A. Ross, *The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions,* 36 HARV. L. REV. 263; Max Schoetz, *The Industrial Commission of Wisconsin and Its Administration of the Workmen's Compensation Acts,* 7 MARQ. L. REV. 37; Ellsworth Williams, *The Industrial Commission of Virginia,* 9 VA. L. REV. 591; 10 VA. L. REV. 37; and notes on finality of findings or of decision of commission, in 14 CORNELL L. Q. 250; 7 TEX. L. REV. 186; 35 W. VA. L. Q. 174; and 4 WIS. L. REV. 236; on jurisdiction of court in Iowa when facts undisputed, in 11 IOWA L. REV. 381; on suits to enforce awards, in 5 TEX. L. REV. 221; on election of remedies, in 11 MINN. L. REV. 577; on nature of award, in 11 IOWA L. REV. 182; on immunity of award from garnishment, in 28 COLUM. L. REV. 985; 14 CORNELL L. Q. 111; 3 ST. JOHNS L. REV. 129; 4 TEX. L. REV. 538; and 77 U. PA. L. REV. 144; on prohibition of assignment of claims, in 15 KY. L. J. 57; on time within claims may be filed, in 6 TEX. L. REV. 244; on necessity of employee's appearance for examination, in 26 COLUM. L. REV. 119; on what is sufficient notice to employer of accident, in 13 VA. L. REV. 243; on consent to optional Act as bar to attacking its constitutionality, in 42 HARV. L. REV. 435; on use of funds for administrative

an elective one. Mr. Chief Justice Taft pointed out that the employer "was given an election to defend against a full court proceeding but accepted the alternative of the Compensation Act" and said that "having elected to accept the provisions of the law and such benefits and immunities as it gives" he "may not escape its burdens by asserting that it is unconstitutional," since the election is a waiver and estops such complaint. The issue of fact in the case was whether death was due to accident or suicide.

In sustaining a provision in the Nebraska Workmen's Compensation Statute which restricted the fees of attorneys in compensation proceedings to those allowed by the court, Mr. Justice Holmes in *Yeiser* v. *Dysart* [52] referred to the fact that "the subject-matter is a right created by statute" as an added justification for what he also regarded as a condition attached to the license to practice law. Just how far the state could go in limiting the charges of others than lawyers is not revealed.

The only state laws declared unconstitutional in the cases primarily in this section are those providing for compulsory arbitration of industrial disputes [53] and those inaugurating minimum wage schedules for women in industry.[54] While the arbitration statute chanced to be protested by employers, the law was designed to coerce employees as well. This may perhaps help to explain why the court was unanimous in its condemnation. In the cases annulling state minimum wage laws, Mr. Justice Brandeis dissented and Mr. Justice Holmes announced his concurrence solely because he felt himself bound by *Adkins* v. *Children Hospital.*[55] In that case there was dissent from Mr. Chief Justice Taft and Justices Holmes and Sanford, with Mr. Justice Brandeis not sitting. The only other case in which there was

purposes, in 23 COLUM. L. REV. 495; and on right of state to invest industrial accident fund in office building for state, in 7 OREG. L. REV. 344.

[52] 267 U. S. 540, 45 Sup. Ct. 399 (1925), *supra,* pages 82-83, discussed in 9 MINN. L. REV. 675.

[53] Wolff Packing Co. v. Court of Industrial Relations, note 4, *supra;* Wolff Packing Co. v. Court of Industrial Relations, note 7, *supra;* Dorchy v. Kansas, note 10, *supra.*

[54] Murphy v. Sardell and Donham v. West-Nelson Manufacturing Co., note 28, *supra.*

[55] Note 29, *supra.*

dissent was *Cudahy Packing Co.* v. *Parramore*,[56] in which Justices McKenna, McReynolds and Butler objected to awarding compensation against an employer for the death of an employee while riding in the car of a fellow employee on his way to work.

Except for the cases on minimum wage and compulsory arbitration, this period seems to present little of importance in the way of Supreme Court interference with legislative interposition in the field of industrial relations. If, however, we turn to the application of the Sherman Law to enjoin a peaceful boycott of stone quarried under anti-union conditions,[57] and link this with the cases in the period immediately preceding involving the Clayton Act [58] and the Arizona statute withholding injunctive relief against picketing unaccompanied by physical violence,[59] we are not likely to assume that governance by the Supreme Court is ineffective in protecting the interests of employers against legislative hopes of employees. The cases in which legislation on behalf of employees has been sustained are trifles as compared with those in which employees have found the Supreme Court a strong right arm against them. There has been sufficient difference of opinion among the Justices to make it idle to say that leaders of labor, so-called, have no interest in the manner of man that may be nominated to succeed Justices who retire. It is hard to say that appointments to the bench should be removed from the realm of politics when to the bench is confided such far-reaching and often uncontrollable political power.

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[56] Note 39, *supra*.

[57] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, note 15, *supra*.

[58] Duplex Printing Co. v. Deering and American Steel Foundries v. Tri-City Central Trades Council, note 14, *supra*.

[59] Truax v. Corrigan, note 14, *supra*.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—VIII [1]

X. INCIDENTS OF RIGHTS OF ACTION

PROBLEMS relating to the jurisdiction and procedure of courts are sufficiently numerous and sufficiently distinctive to be given treatment in a separate study specially devoted to them. Yet some of them seem worthy of consideration in a more general survey of the scope of state police power. The particular selection here made may be hard to justify on any logical grounds, but it has been dictated by a feeling that what has been chosen has some wider significance than the satisfaction of a primarily technical interest in the modes of state judicial action. The concern is not so much with how the court should demean itself as a court as with how the litigant should be treated as a litigant. Many of the regulations of the treatment of the litigant are dictated by considerations of the enterprise which brings him there, and the adjective prescriptions are affected by views of substantive results. Special treatment of corporations as litigants usually seeks its justification in some claim of special power over them and is often a lever to control their conduct more generally. Questions of extra-territorial judicial action and of restrictions on modes of judicial review of constitutional questions are of concern to the student of government and not merely to the practitioner. Here as elsewhere it is interesting to observe the extent to which minor matters are no longer left to the control of state legislatures and state courts, though here unlike elsewhere, the subject matters are those on which lawyers have peculiar compe-

[1] For preceding instalments, see 17 VA. L. REV. 529-556, 653-675, 765-799, 18 VA. L. REV. 1-36, 131-169, 270-305, 379-414.

tence. Yet though the stuff is lawyers' stuff, it does not follow that it could not wisely be left to the lawyers who sit in state tribunals. The case is different where the states are dealing with matters that affect their neighbors. Not a few of the conflicts here recorded are of this latter kind. The Fourteenth Amendment plays a clearly useful rôle when it is wielded to mark the boundaries between the bailiwicks of different governments and thus to set uniform tests of trespass which all will be coerced to heed.

A. *Subjection of Defendant to Jurisdiction of Court*

The question whether a foreign corporation is doing business in a state so as to be subject to service of process there arises sometimes as a question of constitutional law, sometimes as a question of the interpretation of state or federal statutes and sometimes possibly merely as a question of the non-existent federal common law which federal courts discover and apply. When cases brought in state courts are removed by the defendant to a federal court and the issue of jurisdiction is pressed, the Supreme Court seems often to decide the issue without pointing to the specific generating source of its power to do so. Thus in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*,[2] where service on a completely controlled subsidiary was held insufficient to subject the parent corporation to jurisdiction, Mr. Justice Brandeis says that no constitutional question is directly presented, since there was no state statute authorizing such service. The question was said to be simply whether the foreign parent corporation was doing business within the jurisdiction, and the negative answer was given without telling us whether the court was interpreting the general state statutes or was applying notions of federal common law to the situation after removal to the federal court. So also in *James-Dickinson Farm Mortgage Co.* v. *Harry*,[3] where it was

[2] 267 U. S. 333, 45 Sup. Ct. 250 (1925), considered in Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, reprinted in 60 AMER. L. REV. 19 and 12 VA. L. REG. [N. S.] 152; and a note in 20 ILL. L. REV. 281.

[3] 273 U. S. 119, 47 Sup. Ct. 308 (1927), considered in Robert H. Jackson, *What Price "Due Process"?*, 5 N. Y. L. REV. 435; and notes in 21 ILL. L. REV. 813; 25 MICH. L. REV. 903; and 36 YALE L. J. 882. Some of these notes relate to other features in the case than the one above presented.

conceded by demurrer that the foreign corporation was not doing business in the state, Mr. Justice Brandeis, without telling what kind of law he was laying down, declared that "jurisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he be there on business of the company." [4] Of the four cases which he cited, one was a suit in state courts removed to the federal district court,[5] two involved the general initial jurisdiction of the federal district court,[6] and the other presented an issue of venue for suits arising under the federal Copyright Act.[7] While the complaint of a corporation that it cannot be subject to service of process on an officer in a state in which it does no business is one that will be given comfort under the Fourteenth Amendment,[8] it does not necessarily follow that the Supreme Court might not allow more latitude to a state court than it would sanction in determining whether a case has been rightly entertained by a federal court.

Two cases involved the validity of service in state courts under statutes designating a state official as agent on whom process might be served against foreign corporations on causes of action arising out of business done therein. The ruling in *Minnesota Commercial Men's Association* v. *Benn* [9] that no business was done by the corporation within the state by reason of solicitations by policy holders who were not agents, and who did not themselves transmit applications to the company, resulted in a reversal of the state

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[4] 273 U. S. 119, 122 (1927).

[5] Rosenberg Brothers & Co. v. Curtis Brown Co., 260 U. S. 516, 43 Sup. Ct. 170 (1923), considered in 8 CORNELL L. Q. 263 and 8 VA. L. REG. [N. S.] 942. This held that a foreign corporation which had no other activities in New York than the purchase of goods there was not doing business there, and that service on its president in New York was not valid even though the president might be there making purchases rather than on a frolic of his own.

[6] Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280 (1917); Bank of America v. Whitney Central National Bank, 261 U. S. 171, 43 Sup. Ct. 311 (1923).

[7] Lumiere Co. v. Wilder, 261 U. S. 174, 43 Sup. Ct. 312 (1923).

[8] Riverside & D. R. Cotton Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579 (1915).

[9] 261 U. S. 140, 43 Sup. Ct. 292 (1925), *supra,* pages 148, 191.

judgment that the service on the state official brought the company into court. In *American Railway Express Co.* v. *Royster Guano Co.*,[10] the service in the state court was on a state official after the company had ceased to do business in the state. The cause of action arose out of business previously done therein. The validity of the service arose in a subsequent suit against a successor corporation on the judgment against its predecessor. In sustaining the original service Mr. Justice McReynolds said that the statute might be construed by the state court "as intended to designate an agent upon whom process should be served in suits growing out of transactions within the state where the corporation had failed so to do," [11] and that the Supreme Court was bound by the state court's judgment to that effect. There was no discussion of the validity of such service after the corporation had left the state, but cases were cited in which such validity had been affirmed.[12]

The validity of the original objections to service in a state court were left unconsidered in *Richardson Machine Co.* v. *Scott*[13] because of approval of the state court's ruling that a petition brought by the corporation after judgment by default amounted to a general appearance, since this petition adduced non-jurisdictional grounds of objection, including fraudulent conduct on the part of the plaintiff and the meritoriousness of the corporation's defense, and in addition asked for affirmative relief. A writ of certiorari granted by the Supreme Court was later dismissed on the ground that the state judgment rested on an adequate independent state ground.

The cases on jurisdiction over foreign corporations involve only applications of previously settled ideas. More novel is the issue raised by statutes that borrow a procedure established for

[10] 273 U. S. 274, 47 Sup. Ct. 355 (1927). Justices Sutherland and Butler dissent, but this is very likely confined to the holding that the liability of a predecessor may be enforced against the successor, since they dissented in the companion case of American Railway Express Co. v. Kentucky, 273 U. S. 269, 47 Sup. Ct. 353, *infra*, note 67, in which that was the only point in issue.

[11] 273 U. S. 274, 280 (1927).

[12] Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707 (1903); Hunter v. Mutual Reserve Life Insurance Co., 218 U. S. 573, 31 Sup. Ct. 127 (1910), *semble*.

[13] 276 U. S. 128, 48 Sup. Ct. 266 (1928).

foreign corporations and apply it to non-resident drivers of automobiles within the state. By a Massachusetts statute such travel within the state was declared to be equivalent to the appointment by the non-resident of a designated state official as agent upon whom may be served all process in an action growing out of accident or collision due to such operation of the motor vehicle. In addition to service on the state official, there must be notice to the defendant sent by registered mail, and the plaintiff's affidavit must show the sending of such notice and the fact of defendant's return receipt. This was sustained in *Hess* v. *Pawloski* [14] in which Mr. Justice Butler invoked the established power of a state to exclude non-resident automobilists until they file an appointment of a state official as their agent and said that "having the power so to exclude, the state may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be made." [15] To this he added that "the difference between the formal and applied appointment is not substantial so far as concerns the due process clause of the Fourteenth Amendment." [16]

For failure to make explicit provision for securing actual notice to the non-resident defendant, an otherwise similar New Jersey statute was declared unconstitutional in *Wuchter* v. *Pizzuti*.[17] Although notice was actually served in the particular case,

[14] 274 U. S. 352, 47 Sup. Ct. 632 (1927), considered in Harry John Meleski, *The Case of Hess* v. *Powloski*, 7 BOST. U. L. REV. 273; and notes in 41 HARV. L. REV. 94; 31 LAW NOTES 82; 12 MARQ. L. REV. 236; 26 MICH. L. REV. 201; 2 TEMP. L. Q. 61; 1 U. CIN. L. REV. 486; 76 U. PA. L. REV. 93; 34 W. VA. L. Q. 283; and 4 WIS. L. REV. 307. The case in the court below is discussed in Austin Wakeman Scott, *Jurisdiction over Nonresident Motorists*, 39 HARV. L. REV. 563, reprinted in 60 AMER. L. REV. 403; Edward W. Hinton, *Substituted Service on Non-Residents*, 20 ILL. L. REV. 1, reprinted in 59 AMER. L. REV. 592; Thomas F. Konop, *Service of Process on Nonresident Motorists*, 2 NOTRE DAME LAW. 181; and notes in 5 BOST. U. L. REV. 46; 25 COLUM. L. REV. 204; 38 HARV. L. REV. 111; and 34 YALE L. J. 415. For other notes on the same problem, see 9 BOST. U. L. REV. 121; 30 COLUM. L. REV. 129; 15 CORNELL L. Q. 259; 2 DAK. L. REV. 312; 43 HARV. L. REV. 493, 949; 14 MINN. L. REV. 82; 9 OREGON L. REV. 376; 2 ST. JOHNS L. REV. 333; 4 ST. JOHNS L. REV. 298; 78 U. PA. L. REV. 771; 15 VA. L. REV. 69; 4 WIS. L. REV. 189; and 35 YALE L. J. 113.

[15] 274 U. S. 352, 356-357 (1927).

[16] *Ibid.* 357.

[17] 276 U. S. 13, 48 Sup. Ct. 259 (1928), discussed in 16 CALIF. L. REV. 428; 28 COLUM. L. REV. 667; 13 CORNELL L. Q. 608; 16 GEORGETOWN L. J.

Mr. Chief Justice Taft declared that this was not enough. The statute must so provide. There was dissent from Mr. Justice Brandeis on the ground that the defendant had not urged in the court below the point now decided in his favor and that therefore the Supreme Court should not consider it. Mr. Justice Holmes agreed. Mr. Justice Stone concurred in the judgment of reversal but thought that the cause should be remanded to the state court with leave to it to determine whether the notice in fact given by the secretary of state was required by the statute.

B. *Jurisdiction of Court over Subject Matter*

An Ohio judgment against a Connecticut insurance company for recovery of assessments paid in excess of the limit fixed in an alleged contract was taken to the Supreme Court in *Hartford Life Insurance Co.* v. *Douds* [18] on the objection that the Ohio court lacked jurisdiction of the subject matter for the reason that it involved the internal management of the Connecticut company and the validity of action affecting its assets, over which the Connecticut courts should be allowed exclusive jurisdiction. Mr. Justice McReynolds answered that the conclusion of the state court "that to determine the issue did not require exercise of visitorial power over the corporation" and "that the judgment did not interfere with the discretion of petitioner's officers or the management of its internal affairs" was "plainly right" and added reiteratively:

> "By a written contract petitioner had agreed that no mortuary assessment should exceed $2.68 per thousand. It demanded and received more, and respondent sued to recover the excess. All parties came before the court; the necessary facts were established; and he obtained judgment for a definite sum of money. This cannot interfere with the management of the company's internal affairs." [19]

491; 27 MICH. L. REV. 219; 12 MINN. L. REV. 753; 6 No. CAR. L. REV. 481; 3 NOTRE DAME LAW. 267; 3 ST. JOHNS L. REV. 155; 14 ST. LOUIS L. REV. 62; 2 TEMP. L. Q. 275; 63 U. S. L. REV. 445; 3 U. CIN. L. REV. 85; and 5 WIS. L. REV. 99. The case in the court below or similar cases are considered in 18 CALIF. L. REV. 195; 25 MICH. L. REV. 538; 13 MINN. L. REV. 377; and 39 YALE L. J. 126. In 14 MINN. L. REV. 287 is a note on an amendment to the New Jersey statute involved in Wuchter v. Pizzutti, which required notice to the defendant and was given retroactive effect to validate the statute.

[18] 261 U. S. 476, 43 Sup. Ct. 409 (1923), *supra,* page 142.

[19] 261 U. S. 476, 478 (1923).

In reaching this conclusion, the court was doubtless aided by the fact that the Connecticut court had already held that such suits might be maintained outside of Connecticut and had given judgment on an earlier Iowa judgment for recovery of such excess.

C. *Restrictions on Capacity to Bring Suit*

A North Carolina statute prohibiting the bringing of any action to recover damages alleged to result from defective fertilizer, until after chemical analysis showing the ingredients of the fertilizer, was sustained in *Jones* v. *Union Guano Co.*[20] The provision was part of a comprehensive statute providing for the inspection and certification of fertilizers by a public authority. Its terms and effect are summarized by Mr. Justice Butler as follows:

> "The act does not deprive purchasers of any right or cause of action. On the contrary, it gives additional rights and remedies to one who purchases for his own use fertilizer below the guaranteed value in plant food. The terms of the statute are not made exclusive. Under the act the parties were free to deal on other terms. * * The ingredients of fertilizers can be ascertained definitely by chemical analysis. The department is required to provide chemists and equipment, and to make and report analyses of all fertilizers sent in by purchasers or consumers. The requirement imposed is reasonable and seems well calculated to safeguard against uncertainty, conjecture, and mistake. The analysis is not made conclusive. Other evidence may be introduced by either party. The determination of the department is not substituted for a trial in court." [21]

An objection founded on the equal-protection clause was held untenable, because actions for damages alleged to be due to defective fertilizer present peculiar difficulties and therefore warrant peculiar regulation.[22]

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[20] 264 U. S. 171, 44 Sup. Ct. 280 (1924), *supra,* page 122. The case is discussed in a note in 9 ST. LOUIS L. REV. 240.

[21] 264 U. S. 171, 180-181 (1924).

[22] On conditions on right to bring action or to make defense, see Arthur H. Heuton, *The Settlement of Disputes by Arbitration,* 1 WASH. L. REV. 243; Wharton Poor, *Arbitration under the Federal Statutes,* 36 YALE L. J. 667; Lionel F. Popkin, *Judicial Construction of the New York Arbitration Law of 1920,* 11 CORNELL L. Q. 329; Wesley A. Sturges, *Arbitration under the New North Carolina Statute—The Uniform Arbitration Act,* 6 No. CAR. L.

The ancient doctrine that a foreign corporation not engaged in interstate commerce may be required to comply with local statutes as a condition of bringing suit in the courts of the state was re-affirmed in *Hemphill* v. *Orloff* [23] and applied to a Massachusetts trust which under the Massachusetts statutes and judicial decisions had many of the attributes of a corporation. Aside from citations and quotations, Mr. Justice McReynolds contents himself with saying:

> "It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by Section 2, Article 4 of the Constitution. [The privileges and immunities clause.] * * *
>
> "Obviously the Trust here involved, is a creature of local law which demands the privilege of carrying on business in Michigan as an association — an entity — clothed with peculiar rights and privileges under a deed of settlement undertaking to exempt all of the associates from personal liability. As in the case of a corporation, and for the same general reasons, it cannot rely upon rights guaranteed to the individuals.
>
> "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. * * *" [24]

REV. 363; and notes on statutory construction of arbitration laws, in 29 COLUM. L. REV. 195; on the New York arbitration law, in 30 COLUM. L. REV. 254; on making right to appear before court conditional upon waiver of right to hearing before arbitrators, in 14 MINN. L. REV. 406; on requirement of filing a conciliator's certificate as prerequisite for bringing action for less than $200, in 32 YALE L. J. 616; on exclusion of defendant from divorce trial for failure to pay temporary alimony, in 13 MINN. L. REV. 505; and on striking out answer for not producing papers in civil trial, in 10 CORNELL L. Q. 234.

[23] 277 U. S. 537, 48 Sup. Ct. 577 (1928), *supra*, pages 190-191. For discussion of the case, see notes in 16 CALIF. L. REV. 548; 14 CORNELL L. Q. 70; 23 ILL. L. REV. 717; 27 MICH. L. REV. 317; 15 VA. L. REV. 249, 271; and 5 WIS. L. REV. 174. The decision below is considered in 41 HARV. L. REV. 86.

[24] 277 U. S. 537, 548, 550 (1928).

Mr. Justice McReynolds does not confine himself to power of the state to exclude unregistered corporations from its courts, and the Michigan statute applied by the Michigan court declared that unregistered foreign corporations should not be capable of making a valid contract within the state. The holding of the Michigan court, as stated by Mr. Justice McReynolds, was that the plaintiff "could not maintain the action." Thus it must remain uncertain whether the decision is confined to capacity to sue.

A similar closing of the door of a state court against a suit by a receiver of a foreign corporation that had done business within the state without complying with the requirements as to registration was sustained in *Bothwell* v. *Buckbee, Mears Co.*[25] Mr. Justice Brandeis found that unlicensed business had been done through solicitation of applications by an agent and transmission of the applications to the company. He said that the state would have the right to refuse to enforce such a contract even though made in another state and wholly unobjectionable in its provisions. Here the contract bound the company to do various acts in the unhospitable state which acts were validly prohibited, and "under rules of law generally applicable a state may refuse to enforce a contract which provides for doing within it acts prohibited by its laws." [26]

A citizen and resident of Connecticut who was unable to sue a Connecticut corporation in a New York court on a cause of action arising out of injuries in Connecticut objected unsuccessfully in *Douglas* v. *New York, N. H. & H. R. Co.*,[27] that the privileges and immunities clause of the original Constitution had thereby been violated. By construing the statute to place its distinction on the basis of residence rather than of citizenship, Mr. Justice Holmes held that the privileges and immunities clause was not applicable. Thus a New York citizen who resided outside of New York would be subject to the same treatment as a Connecti-

[25] 275 U. S. 274, 48 Sup. Ct. 124 (1927), *supra,* pages 149-150, 191. There is a note on the case in 3 NOTRE DAME LAW. 145.

[26] 275 U. S. 274, 278 (1927).

[27] 279 U. S. 377, 49 Sup. Ct. 255 (1929), considered in 18 CALIF. L. REV. 159 and 39 YALE L. J. 389. On discrimination in respect to suits by or against non-residents, see notes in 28 COLUM. L. REV. 347; 41 HARV. L. REV. 387; and 2 N. Y. L. REV. 6.

cut citizen resident in Connecticut, and a Connecticut citizen resident in New York would be on a parity with any other New York resident. The residents were all allowed to sue on these alien causes of action while non-residents were left to the discretionary mercy of the New York court. The assumption from the opinion is that the statute would have been unconstitutional had citizenship been the criterion of its distinction.

D. *Restrictions on Pursuit of Constitutional Complaints*

The procedure provided by the Ohio constitution for determining constitutional issues in the state courts forbade the supreme court to declare a statute unconstitutional without the concurrence of at least all but one of the judges, except when affirming a judgment of unconstitutionality in the intermediate appellate court below. In *Bryant* v. *Akron Metropolitan Park District* [28] this had operated to require the state supreme court to sustain a state statute although only two of the seven judges thought it constitutional. To the due process complaint of the offended litigant, Mr. Chief Justice Hughes answered that he had no complaint of the procedure in the lower state court and that it had frequently been determined that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." The complaint of denial of equal protection was founded on the possibility that the Ohio system might operate to have statutes constitutional in the bailiwick of one intermediate appellate court and unconstitutional in the bailiwick of another, as the state supreme court had discovered and called deplorable. Mr. Chief Justice Hughes answered that this would not affect the ultimate determination of issues under the Federal Constitution and that "it is not for this court to intervene to protect the citizens of the state from the consequences of its policy, if the state has not disregarded the requirements of the Federal Constitution. As to the latter he said:

"The provision of the state constitution which is attacked is one operating uniformly throughout the entire State. The

[28] 281 U. S. 74, 50 Sup. Ct. 228 (1930), *supra*, page 7. The case is discussed in Joseph H. Ingham, *Republican in Form*, 34 DICK. L. REV. 193; and a note in 18 CALIF. L. REV. 439. For other notes on the issue, see 23 COLUM. L. REV. 291; 9 ST. LOUIS L. REV. 160; and 33 YALE L. J. 657.

> State has a wide discretion in respect to establishing its systems of courts and distributing their jurisdiction. It has been held by this Court that the equal protection clause of the 14th Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject-matter or finality of decision if all persons within the territorial limits of the respective jurisdiction of the state courts have an equal right in like cases under like circumstances to resort to them for redress. A State 'may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion.' * * Different courts of appeal may be set up for different portions of the State. * * It is thus well established that there is no requirement of the Federal Constitution that the State shall adopt a unifying method of appeals which will insure to all litigants within the State the same decisions on particular questions which may arise. * * *" [29]

A statute of Illinois which, as construed by the Illinois court, put upon litigants the option of appealing directly to the supreme court of the state any case involving a constitutional issue or else of waiving the constitutional issue if on other grounds the case was taken first to an intermediate appellate court was held sufficiently reasonable to be valid in *Central Union Telephone Co.* v. *Edwardsville*.[30] The party has his choice and must abide by it. The constitutional issue thus foreclosed from consideration was one predicated on the federal Constitution, and the case at bar appeared to be the first in which the state court had brought federal questions within the scope of the statute. Such a construction, however, was declared by Mr. Chief Justice Taft to be neither forced nor strained, and therefore one which the Supreme Court must accept as a matter of state law.

So also in *Love* v. *Griffith* [31] the refusal of a state court to consider the constitutionality of the ruling of a party committee excluding negroes from the Democratic primary was found to be adequately premised upon the reason that a bill for an injunction should be dismissed when it does not come before the appellate court until after the primary in question is an affair of the past.

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[29] 281 U. S. 74, 81 (1930).
[30] 269 U. S. 190, 46 Sup. Ct. 90 (1925).
[31] 266 U. S. 32, 45 Sup. Ct. 12 (1924), *supra*, page 9.

Mr. Justice Holmes observes that "the bill was for an injunction that could not be granted at that time" and concludes that "there was no constitutional obligation to extend the remedy beyond what was prayed." [32]

E. *Notice and Hearing Necessary to Determine Rights*

Several steps in the procedure provided by the California statutes for transferring to the state treasury such deposits in banks as have been unclaimed for twenty years were unsuccessfully contested by a bank in *Security Savings Bank* v. *California,*[33] in which the bank urged that depositors would not be bound by the judgment against it in favor of the state and so might later recover the deposit from the bank. Mr. Justice Brandeis comforted the bank by pointing out that if the deposit is turned over to the state in pursuance to a valid law, the liability of the bank is discharged. He held that personal service on the bank is a sufficient seizure of the deposit although notice to the unknown depositor is by publication only. He declined to go into various niceties as to whether the proceeding was one *in rem,* or *quasi in rem,* or *in personam,* and said that in any case due process was satisfied by seizure of the *res* at the commencement of the suit and reasonable notice and opportunity to be heard. Service on the bank was declared to be seizure or its equivalent, even though the claim of the state "may be defeated by appearance of the debtor [*sic*] or other claimant." [34] Earlier he had said that "there is no constitutional objection to considering the proceedings as *in personam,* so far as concerns the bank; as *quasi in rem,* so far as concerns the depositors; and as strictly *in rem,* so far as concerns other claimants." [35] As to the published notice, the absence of an affidavit that personal service is impossible or impractical is immaterial when the statute applies only to deposits that have remained dormant for twenty years when the depositor is not known to the president or managing officer of the bank to be alive. Publication

[32] 266 U. S. 32, 34 (1924).

[33] 263 U. S. 282, 44 Sup. Ct. 108 (1923), *supra,* pages 134, 154-155, discussed in notes in 4 BOST. U. L. REV. 205 and 9 ST. LOUIS L. REV. 149.

[34] 263 U. S. 282, 288 (1923).

[35] *Ibid.* 287.

for four successive weeks in a newspaper in the county in which the state capitol is located was held to constitute reasonable notice, and publication in the county where the bank is located may be dispensed with when by another statute there must be in a paper in that county annual publication of deposits that have been quiescent for ten years. The fact that nine annual publications in the county where the bank is located have proved fruitless may well justify the state in picking a single county for subsequent publication incident to the seizure of the deposits. Thus the provisions were sustained against the complaints that they afforded insufficient time for entering an appearance and that the contents of the notice failed to convey the required information. This approval or condonation of the procedure follows the statement that transfer to the state under a valid law discharges the bank's obligation to its depositor. Subsequent rights of the depositor against the state were left unconsidered because not passed upon by the state court for the reason that no depositor had appeared. The state court indicated that such depositor might have five years to claim from the state, even though named in the state's suit, provided he did not appear therein. The statute gave such right to those not a "party or privy" in the original proceeding. "It is," says Mr. Justice Brandeis, "no concern of the bank's whether the state receives the money merely as depositary or takes it as an escheat."[36]

Even if a bank's obligation to its depositor is not securely discharged by proceedings under a statute compelling the payment of the deposit to some one else, the bank is not necessarily entitled to immunity from the compulsion. Thus a bank which was compelled to pay to a deserted wife the deposit owing to an absconding husband was told in *Corn Exchange Bank* v. *Coler*[37] that it could not object because the depositor would not be bound by the decree and might possibly persuade a later tribunal that the facts were different from those on which the compulsory payment to the wife was premised.

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[36] *Ibid.* 286.

[37] 280 U. S. 218, 50 Sup. Ct. 94 (1930), *supra,* pages 70-71, 133, discussed in 30 COLUM. L. REV. 257; 15 CORNELL L. Q. 620; and 4 ST. JOHNS L. REV. 293; and the decision in the court below, in 29 COLUM. L. REV. 669 and 28 MICH. L. REV. 75.

What was in substance a method of foreclosing a mortgage in proceedings which afforded no notice to a prior purchaser of the land subject to the mortgage was sustained in *Scott* v. *Paisley*[38] on the analogy of the established propriety of exercising a contractual power of sale by the mortgagee without notice to purchasers from the mortgagor subject to the mortgage. Under the provisions of the Georgia statute in question the creditor with a so-called security deed of land might after reducing his debt to judgment execute to the debtor a quit-claim deed of the land and record the deed in the clerk's office, whereupon the property may be levied upon and sold and the proceeds applied to satisfy the judgment. There was no notice to the purchaser of the mortgagor's interest, either in the creditor's suit to reduce the debt to judgment or in the subsequent proceeding to sell the land after the creditor quit-claimed it back to the mortgagor. Apparently the objection was confined to absence of notice in the proceedings to sell. The petitioner asked that the sale be declared void as against her and that she be declared equitable owner with the right to redeem. Her complaint against the procedure was declared to be without support from either the due-process or the equal-protection clause, without statement of any special point predicated upon discrimination. After the sheriff levied execution on the land, there was due advertisement of the succeeding public sale.

The Georgia statutory procedure for collecting assessments from stockholders of insolvent banks authorized the state superintendent, after notice to the stockholder and neglect by him to pay, to issue an execution for the amount, the execution being made a lien on property of the depositor. A suit to enjoin the use of this procedure was held rightly dismissed in *Coffin Brothers & Co.* v. *Bennett*[39] for the reason that the stockholder was allowed by affidavit of illegality to raise before a court every possible defense that would be open if the superintendent had been obliged to initiate the proceeding by a suit. Thus the so-called execution was in substance only a mode of commencing suit. As Mr. Justice Holmes puts it:

"* * * The Fourteenth Amendment is not concerned with

[38] 271 U. S. 632, 46 Sup. Ct. 591 (1926), *supra,* page 133.
[39] 277 U. S. 29, 48 Sup. Ct. 422 (1928), *supra,* page 157.

> the form. * * The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into Court, is a familiar method in Georgia and is open to no objection. * * *
>
> "As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit. * * *" [40]

Power conferred upon a judgment creditor, after execution has been returned unsatisfied, to apply to a court without notice to the judgment debtor for an execution against wages due the debtor was sustained in *Endicott Johnson Corporation* v. *Encyclopedia Press* [41] in an opinion in which Mr. Justice Sanford invoked state decisions in support of such procedure and declared that the prior notice which the debtor had in the main suit satisfied the fundamental requirement of fairness imposed by the Fourteenth Amendment. The statute applied only when the wages were at least twelve dollars a week and confined the lien and levy to ten per cent of such wages until the execution was satisfied. The case was a suit against the employer for the accumulated percentages of wages which he had declined to pay over to the judgment creditor after the notice given him under the statute, and the court decided the case under the assumption that the garnishee could raise constitutional claims of the judgment debtor, without indicating whether the assumption would be accepted where the result would be to defeat the statute.

F. *Discrimination in Matters of Procedure and Venue*

The ruling that a foreign corporation in the state solely as

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[40] 277 U. S. 29, 31 (1928).

[41] 266 U. S. 285, 45 Sup. Ct. 61 (1924). This decision is followed by Endicott Johnson Corporation v. Smith, 266 U. S. 291, 45 Sup. Ct. 63 (1924).

On matters relating to collection of claims and judgments, see Abraham L. Freedman, *Imprisonment for Debt*, 3 TEMP. L. Q. 330; Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24; John H. Lewis, *Principles of Exemption Laws*, 2 DAK. L. REV. 140; and notes on power to prefer local creditors of insolvent as to property within the state, in 77 U. PA. L. REV. 1001; on attachment of household property for debt for labor, in 1 WASH. L. REV. 209; on exemption laws of Washington, in 1 WASH. L. REV. 169; and on imprisonment for debt, in 15 CALIF. L. REV. 153; 41 HARV. L. REV. 786; and 37 YALE L. J. 509.

plaintiff in a cause of action in the state court for recovery of property brought into the state by an alleged wrong-doer is by reason of that fact alone a person within the jurisdiction entitled to invoke the equal-protection clause was a prelude to the inquiry in *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*[42] whether the Wisconsin discrimination against foreign corporations in the matter of procedure for conducting examinations before trial is unconstitutional. Wisconsin corporations and individual citizens were subject to such examination only in the county of their residence. Non-resident individuals were subject to examination only if served with process within the state, and the examination had to be held in the county in which service was had. Foreign corporations, on the other hand, were subject to such examination in any county in the state. In the present case the plaintiff foreign corporation had brought suit and the action had been dismissed for non-compliance with the order to its secretary to submit himself to examination within the state. The secretary's refusal had the sanction of the company which for itself and its secretary had consented to such an examination at its home office outside the state. Mr. Justice Brandeis, in dissenting, insisted that a foreign corporation not doing business within the state could not be regarded as a "person within the jurisdiction" without overruling former cases, and that whether the discrimination were justifiable would depend upon circumstances to be considered by the judge asked to issue the order for examination before trial. Therefore the statute should not be held unconstitutional on the theory that the additional burden on foreign corporations could never be properly imposed. Mr. Justice Holmes joined in the dissent of Mr. Justice Brandeis. For the majority, Mr. Justice Van Devanter, after pointing out the importance to the plaintiff of bringing action in the state and saying that under the circumstances the right to do so was plain, disposed of the two constitutional issues as follows:

> "* * * To have denied that right would in effect have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight

[42] 262 U. S. 544, 43 Sup. Ct. 636 (1923), *supra*, page 194, discussed in 2 WIS. L. REV. 428.

with indifference. It was 'person' within the meaning of both the due process clause and the equal protection clause of the 14th Amendment. * * The latter clause declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws' meaning, of course, the protection of laws applying equally to all in the same situation. The words 'within its jurisdiction' are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. * * And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances; for, as was held in Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 'a State has no more power to deny to corporations the equal protection of the law than it had to individual citizens.'

"No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like. * *; but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

"We hold that the statute as it was applied in this case was

invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. * * *" [43]

Another discrimination against foreign corporations in respect to venue in actions brought against them in the courts of the state was declared unconstitutional in *Power Manufacturing Co.* v. *Saunders*.[44] Such corporations were subject to suit in any county in the state, while a domestic corporation could be sued only in a county in which it has its principal place of business or in which its chief officer resides. Natural persons could be sued only in a county in which they reside or may be found. In declaring that the discrimination denied to foreign corporations the equal protection of the laws, Mr. Justice Van Devanter said:

"No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

"Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to

[43] 262 U. S. 544, 550-551 (1923).

[44] 274 U. S. 490, 47 Sup. Ct. 678 (1927), *supra*, page 192, note 66, discussed in 8 BOST. U. L. REV. 134; 41 HARV. L. REV. 93; 22 ILL. L. REV. 656; and 6 NEB. L. BUL. 303. On similar discrimination against foreign corporations, see 8 MINN. L. REV. 47, 61; 14 MINN. L. REV. 83; and 7 TEX. L. REV. 155.

> foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." [45]

To this Mr. Justice Van Devanter added that the discrimination could not be justified because it is concerned with venue which is in general subject to state prescription or because the corporation is to be assumed to have consented to provisions in force when it sought and obtained permission to do business in the state. Mr. Justice Holmes, on the other hand, declared the provision one which the corporation should be held to have accepted in the same way as it is held subject to service by process on a state officer if it does business when a statute so provides. He also thought the discrimination sufficiently reasonable to be sustained on independent grounds. Mr. Justice Brandeis joined in the dissent.

G. *Miscellaneous Matters, Mostly of Procedure*

The action of a state court in striking from the records the answer of a defendant which advanced a counter-claim and asked for a determination under a declaratory judgment law that a co-operative marketing statute was unconstitutional was held to raise no federal question in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association.*[46] The state statute apparently authorized only plaintiffs to ask for declaratory judgments and it also vested the courts with broad discretion to decline such petitions. Mr. Justice McReynolds observed briefly that "this court has no jurisdiction to review a mere declaratory judgment", invoking a case declaring that such proceedings are not cases or controversies and holding that the federal conformity statute does not authorize federal district courts to entertain a proceeding that would be outside their constitutional jurisdiction.[47] The fact that it is now declared that

[45] 274 U. S. 490, 493-494 (1927).

[46] 276 U. S. 71, 48 Sup. Ct. 291 (1928), *supra,* pages 176-180.

[47] Liberty Warehouse Company v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282

the United States Supreme Court cannot review a declaratory judgment in a state court suggests the interesting question whether one might have a federal complaint against a state proceeding which would be immune from direct review by the Supreme Court, and whether the state judgment would constitute an estoppel that would prevent persons adversely affected from raising identical issues against the same parties or privies in independent proceedings. On the action of the state court, Mr. Justice McReynolds said:

> "No Federal right was impaired by striking section three from the amended answer and counterclaim. Proceedings in state courts must conform to the reasonable requirements of local law. Whether they do is primarily for those courts to determine. Here we find no abuse of that power." [48]

The action in the case was for a penalty and attorney's fee against a warehouse company that bought tobacco from a producer with knowledge that he had contracted to sell it to the cooperative association of which he was a member. After sustaining the substantive provision penalizing such interference with

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(1927). Subsequently, and three months after the case above reviewed in the text, Mr. Justice Brandeis declared in Willing v. Chicago Auditorium Association, 277 U. S. 274, 48 Sup. Ct. 507 (1928), that a declaratory judgment proceeding is not a case or controversy within the clause describing the jurisdiction of federal courts. Mr. Justice Stone concurred specially on the ground that the case before the court was not authorized by existing federal statutes. In addition he observed:

> "But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the Federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this Court is without constitutional power to review such judgments of state courts when they involve a federal question. * * * There is certainly no 'case or controversy' before us requiring an opinion on the power of Congress to incorporate the declaratory judgment into our federal jurisprudence. And the determination now made seems to be very similar itself to a declaratory judgment to the effect that we could not constitutionally be authorized to give such judgments—but is, in addition, prospective, unasked, and unauthorized under any statute." (277 U. S. 274, at 290-291).

One or both of these two cases are considered in Edwin M. Borchard, *The Supreme Court and the Declaratory Judgment*, 14 A. B. A. JOUR. 633; and notes in 100 CENT. L. J. 95; 40 HARV. L. REV. 903; 23 ILL. L. REV. 595; 25 MICH. L. REV. 529; 6 N. Y. L. REV. 235; 13 VA. L. REV. 644; 36 YALE L. J. 845; and 38 YALE L. J. 104.

[48] 276 U. S. 71, 88 (1928).

contracts, Mr. Justice McReynolds declared that "a provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it." [49]

In a mandamus proceeding brought in a state court to compel a railroad to comply with an order of a city council to remove a grade crossing, the railroad insisted upon a constitutional right to have issues of fact raised by the answer determined by a jury, but in *Southern Railway Co.* v. *Durham*[50] Mr. Justice McReynolds gave the short answer that "neither Federal laws nor Constitution gave them the right to demand trial by jury when the local statutes and practice prescribed otherwise." [51]

The assertion that "to modify the substantive and procedural law so that recovery may be had in tort for a breach of contract is well within the power of the state" was adduced by Mr. Justice Brandeis in *James-Dickinson Farm Mortgage Co.* v. *Harry* [52] to dismiss an objection that it was unconstitutional to provide by statute that a false promise to do some future act shall constitute actionable fraud when the promise is a material inducement to entering into the contract. He added that many courts have long given a remedy in tort for a false promise as a species of false representations, so that the statute here has common-law precedents.

Presumably presumptions are procedural where they are not conclusive. They deal with the way of proving a case rather than with what case must be established to win. Strictly, therefore, disputes about presumptions should be catalogued under incidents of rights of action rather than under liabilities. Since, however, the permissible stretch between the presumption and the supposed ultimate fact is affected not only by the gap between the two but by the court's view of the hypothetical propriety of premising liability on the fact established without regard to the remoter fact of which it may be evidence, there seems to be wisdom

[49] *Ibid.* 97.

[50] 266 U. S. 178, 45 Sup. Ct. 51 (1924).

[51] 266 U. S. 178, 179 (1924).

[52] Note 3, *supra.*

On other statutory changes in procedure, see notes in 9 MINN. L. REV. 156, on ordering equity to grant specific performance even though there is an adequate remedy at law; and in 37 HARV. L. REV. 510, on forbidding court to direct verdict.

in deferring the more detailed consideration of the cases on presumptions to the succeeding section dealing with liabilities. There is an interrelation between the basis of liability and the mode of establishing it which would be missed if the two were treated wholly apart from each other. It was in *Ferry* v. *Ramsey* [53] that Mr. Justice Holmes sustained a statutory declaration that insolvency of a bank at the time of the receipt of a deposit should be *prima facie* evidence of a director's knowledge of the insolvency and assent to the deposit, and gave as a reason the fact that a director might have been made absolutely liable to depositors irrespective of his knowledge of insolvency and consent to the receipt of the deposit. He implied also that the presumption was not wholly preposterous as evidence of knowledge. Mr. Justice Sutherland, for himself and Justices Butler and Sanford disagreed, and insisted that the presumption must be tested by what the state had in fact made the basis of liability and not by what it might have chosen.

A statutory declaration that failure to comply with a promise within a reasonable time shall give rise to a presumption that the promise was falsely and fraudulently made and shall put upon the promisor the burden of showing that it was made in good faith was approved *obiter* by Mr. Justice Brandeis in *James-Dickinson Farm Mortgage Co.* v. *Harry* [54] in a case in which the trial court gave no charge based upon that provision of the statute. The case before the court was one removed from an Illinois court to the federal court for an Illinois district. The statute involved was one of Texas and the action was for damages resulting from alleged false promises in Texas. If the presumption were purely procedural, it should not enter into an Illinois lawsuit. Mr. Justice Brandeis adverted to the point, but said only that "it is at least doubtful whether this provision should be construed as applying to actions brought outside Texas," without indicating whether the doubt was of common law alone or of constitutional law as well.[55]

[53] 277 U. S. 88, 48 Sup. Ct. 443 (1928), *supra,* page 158, discussed in 7 No. CAR. L. REV. 62 and 16 VA. L. REV. 375.

[54] Notes 3 and 52, *supra.*

[55] A statute declaring that "every insolvency of a bank shall be deemed fraudulent" and making the president and directors criminally liable unless

A presumption of negligence in the operation of a train based on the mere fact of injury ensuing therefrom was held irrational and unconstitutional in *Western & A. R. Co.* v. *Henderson*[56] in which an earlier case was distinguished because in it the presumption disappeared as soon as opposing evidence was introduced, whereas here the charge of the trial judge left the presumption as evidence which the defendant must rebut by preponderant proof of care.

In three cases there was dispute whether the forum was applying a statute of the proper state to the controversy before it. *Aetna Life Insurance Co.* v. *Dunken*[57] reversed a state court for awarding a penalty and counsel fees in a suit on a contract made and to be performed in another state which made no provision for such emoluments of victory. *Home Insurance Co.* v. *Dick*[58] announced that a contract of another country in which suit thereon was validly restricted to a period of one year could not be enforced after that period by applying a statute of the forum which forbade such restriction of the right to sue. *James-Dickinson Farm Mortgage Co.* v. *Harry*[59] held that a statute

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they show "that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe" was declared unconstitutional in Manley v. Georgia, 279 U. S. 1, 49 Sup. Ct. 215 (1929), on the ground that the fact of insolvency is no sufficient basis for inferring fraud. This was thought by Mr. Justice Butler to be especially true in the statute in question because the definition of insolvency had recently been expanded to include a number of situations not theretofore regarded as a state of insolvency. For discussions of this case, see notes in 9 BOST. U. L. REV. 218; 17 CALIF. L. REV. 565; 42 HARV. L. REV. 1076; 43 HARV. L. REV. 100; 24 ILL. L. REV. 689; 13 MARQ. L. REV. 244; 27 MICH. L. REV. 951; 13 MINN. L. REV. 727; 7 No. CAR. L. REV. 453; 8 No. CAR. L. REV. 50; 14 ST. LOUIS L. REV. 434; 15 ST. LOUIS L. REV. 181; 63 U. S. L. REV. 370; and 16 VA. L. REV. 375.

[56] 279 U. S. 639, 49 Sup. Ct. 445 (1929), considered in 17 CALIF. L. REV. 580 and 43 HARV. L. REV. 100. The legislative provision is considered in W. W. Venable, *Mississippi's Prima Facie Statute,* 2 MISS. L. REV. 384. On other presumptions, see Ellahue A. Harper and Fowler Vincent Harper, *Establishing Railroad Liability for Fires,* 77 U. PA. L. REV. 629.

[57] 266 U. S. 389, 45 Sup. Ct. 129 (1924), *supra,* pages 140-141, discussed in 38 HARV. L. REV. 804, 826; 20 ILL. L. REV. 72, 822; 23 MICH. L. REV. 643, 665; and 3 TEX. L. REV. 286.

[58] 281 U. S. 397, 50 Sup. Ct. 338 (1930).

[59] Notes 3, 52, and 54, *supra.*

creating a liability and allowing exemplary damages may be recognized as the basis of a right of action in the forum of another state, notwithstanding the fact no such liability would arise under its own laws. The contention that the statute of the sister state was a penal one because of the provision for exemplary damages was held to be a mistaken one. It was not revealed whether the enforcement in one state of the penal statute of another is obnoxious to constitutional canons. The particular case was one started in a state court and removed to a federal court, so that the Supreme Court might have ordered the dismissal of an action on an outside penal statute on considerations exclusively common-law.

Where the issue is whether a provision goes to the remedy or to the right, as the distinction is often put, the rival claims of procedure and substance make it seem desirable to deal with the cases under our two heads of Incidents of Rights of Action and of Liabilities. The law would look artificially pretty if we should take the judicial answers as exclusive bases of classification. It would be difficult to mark a line by describing only what is ultimately, after dispute, placed on one side of it. Therefore a number of the cases mentioned in this section will be repeated in the section to follow. With respect to presumptions which may concededly be wholly procedural, it seems wise to treat them also in connection with the substantive rules of liability, because the fight about them, when it occurs, is a sign that they may have influenced the outcome of the lawsuit. Perhaps curative statutes should be mentioned under Incidents of Rights of Action, because they are complained of because of their menace to a right to sue or to defend. It is, however, more than an incident that the substantive situation has been changed, and our only case on a curative statute [60] is reserved for the section on Liabilities.

H. *Judicial Action Predicated Solely Upon Common Law*

It is assumed to be established that mere mistakes in common law or mere application of harsh and grievous rules without any statutory dictation do not render the decree of a state court ob-

[60] Charlotte Harbor & Northern Railway Co. v. Wells, 260 U. S. 8, 43 Sup. Ct. 3 (1922).

noxious to the Fourteenth Amendment or even raise a federal question under that Amendment. This does not apply to assumptions of jurisdiction to entertain a proceeding and it may not apply to some matters of procedure. Certainly in criminal proceedings a court must behave like a court and not like a vigilance committee.[61] How far in civil cases there may be a similar federal scrutiny of state judicial proceedings not advised or commanded by statutes is open to question. Sometimes the court in condoning procedural action of a state court refrains from saying that it may do as it pleases so far as the Fourteenth Amendment is concerned.[62] Sometimes in approving of the procedure applied, it tells us that error and irregularity do not deny due process. Such were the words of Mr. Justice Sanford in *Stephenson* v. *Kirtley*[63] in sustaining the dismissal by a federal district court of a bill to set aside certain proceedings in a lower state court. Yet here the complainant had contended that the failure to hear proof before declaring certain deeds fraudulent, in case where no personal service was had, went to the jurisdiction of the court, and so the language of the opinion is not to be taken too broadly. The issue is sometimes clouded by reason of limitations on collateral attack on judgments, and limitations on raising issues by writ of error. In the era under consideration, no state judicial action in civil matters was reversed by the Supreme Court for faults in procedure except when the procedure was authorized or devised by statute. The details of the cases belong more appropriately in a review concentrating on state judicial action than in one concerned with police legislation. It is, however, important to observe that more latitude is allowed to judicial inventiveness and even perversity than to corresponding activities of a legislature.

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[61] Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. 265 (1923).

[62] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association, note 46, *supra*. See passage quoted *ante*, page 253.

[63] 269 U. S. 165, 46 Sup. Ct. 50 (1925). At page 167, Mr. Justice Sanford said:

> "The allegations of the complaint might be established either by the introduction of proof or by admission through the default; and error or irregularity in this respect would neither constitute ground for setting aside the decree which the court had acquired jurisdiction to render, nor take from it the attribute of due process."

As to matters of substance, the rule of state judicial autonomy seems to be unqualified. Alleged mistakes not coerced by statute do not authorize invocation of the obligation-of-contracts clause,[64] nor when made by a federal court do they involve the construction or application of the Constitution of the United States under statutes relating to appeals. This last was decided in *Corrigan* v. *Buckley*[65] in which complaint was directed against judicial enforcement of a covenant restricting occupancy of lands by negroes. Here Mr. Justice Sanford declared that "mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."[66] Turning to state decisions alleged to violate the Fourteenth Amendment, we find Mr. Justice McReynolds saying in *American Railway Express Co.* v. *Kentucky*[67] that "a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."[68] The statement is weakened by the fact that the opinion goes on to show that the state court's rule of liability is in no way arbitrary. So long as the justices preface their declarations with "mere" and "merely", we must be uncertain as to the extent of their tolerance toward their state brethren.

I. *Conclusion*

This review of Supreme Court scrutiny of civil litigation in state courts is incomplete. It does not include issues of *res adjudicata* raised under the full faith and credit clause or a number of other matters that will find their place in a separate catalogue of cases on the jurisdiction and procedure of courts. The propriety of state judicial action sometimes comes to the Supreme Court as an issue whether the state decision rests on an independ-

[64] Western Union Telegraph Co. v. Georgia, 269 U. S. 267, 46 Sup. Ct. 46 (1925); Fleming v. Fleming, 264 U. S. 29, 44 Sup. Ct. 246 (1924); Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 Sup. Ct. 197 (1924); Rooker v. Fidelity Trust Co., 261 U. S. 114, 43 Sup. Ct. 288 (1923).

[65] 271 U. S. 323, 46 Sup. Ct. 521 (1923), *supra*, page 117, note 59.

[66] 271 U. S. 323, 332 (1923).

[67] 273 U. S. 269, 47 Sup. Ct. 353 (1927), reviewed in 28 COLUM. L. REV. 273.

[68] 273 U. S. 269, 273. Justices Sutherland and Butler dissent.

ent state ground so that it cannot be said that the state court has wrongfully foreclosed consideration of a federal constitutional question. At least two of the cases here reviewed arose in this form, and there are doubtless more. Cases on criminal prosecution and procedure are reserved for a later section dealing with the mode of enforcing police requirements. Even without these additional cases, there are enough here to make clear that state legislatures are far from free to prescribe the form of state judicial action as they think best.

It is interesting to observe, however, that in all but one of the cases in which state courts or legislatures were rebuked, the decisions established protection to corporations or citizens of other states. The exception was *Western & A. R. Co.* v. *Henderson* [69] which ended a statutory presumption of negligence from the fact of injury from the operation of a train, where the presumption was entitled to weight against competing evidence. In only three other cases were statutes declared unconstitutional. *Wuchter* v. *Pizzuti* [70] found fault with absence of explicit provision for actual notice to non-resident automobilists in a statute subjecting them to the jurisdiction of a court by service on a state official. *Power Manufacturing Co.* v. *Saunders* [71] and *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation* [72] rebuked discriminations against foreign corporations with respect to the place in which they might be sued and the place in which they might be compelled to be examined before trial in actions brought by them. The other cases involved judicial action in applying statutes to situations which the Supreme Court found to be constitutionally immune from them. *Home Insurance Co.* v. *Dick* [73] held it wrong to apply a statute of the forum to entertain a cause of action that had died by limitation of the law properly applicable to the contract in suit. *Aetna Life Insurance Co.* v. *Dunken* [74] ended a similar generosity in applying a statute authorizing a penalty and counsel fees, and reversed a state court

[69] Note 56, *supra.*
[70] Note 17, *supra.*
[71] Note 44, *supra.*
[72] Note 42, *supra.*
[73] Note 58, *supra.*
[74] Note 57, *supra.*

for thinking that such a statute of the forum could apply to a suit on an outside contract. The other cases were ones in which foreign corporations were held not to be so doing business as to be subject to suit in the jurisdiction in which plaintiffs sought to reach them. Only in *Minnesota Commercial Men's Association* v. *Benn*[75] did this involve the reversal of a state court.

In these cases setting limits to state power, there were three in which Justices Holmes and Brandeis dissented. Their objection to *Wuchter* v. *Pizzuti*[76] was merely that the point in issue had not been adequately presented below so as to be open above. Mr. Justice Stone thought the point open but felt that proper procedure would have instructed the state court to determine the issue of statutory interpretation. More fundamental were the dissents of Justices Holmes and Brandeis in the two decisions saving foreign corporations from discriminatory treatment in the state courts.[77] The other dissents were in cases sustaining state action. Justices Sutherland, Butler and Sanford protested in *Ferry* v. *Ramsey*[78] against approval of a presumption of a director's knowledge and assent from the fact of the receipt of a deposit by a bank when it was insolvent. Justices Sutherland and Butler disagreed with *American Railway Express Co.* v. *Kentucky*[79] which approved a common-law ruling of a state court holding a successor express company liable for the defaults of its predecessor. Their dissent in *American Railway Express Co.* v. *Royster Guano Co.*[80] was probably confined to the same point, though there was another issue in the case as well. They gave their reasons in neither case, although their apparent notion that the Supreme Court can keep state courts from finding rough common-law rules of liability is revolutionary in the extreme.

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[75] Note 9, *supra.* The other cases in which jurisdiction was denied are Cannon Manufacturing Co. v. Cudahy Packing Co., note 2, *supra;* James-Dickinson Farm Mortgage Co. v. Harry, note 3, *supra;* Rosenberg Brothers & Co. v. Curtis Brown Co., note 5, *supra;* Bank of America v. Whitney Central National Bank, note 6, *supra;* and Lumiere Co. v. Wilder, note 7, *supra.*

[76] Note 9, *supra.*

[77] Power Manufacturing Co. v. Saunders, note 71, *supra;* Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, note 72, *supra.*

[78] Note 53, *supra.*

[79] Note 67, *supra.*

[80] Note 10, *supra.*

The cases in this section deal for the most part with lawyers' law. This may be the reason why so many of them seem uninteresting as compared with the other cases that touch more closely the vital concerns of individuals. Many lawyers complain that constitutional law is not law but politics. Perhaps, however, all law is more politics that some may be willing to confess. Certainly it was judicial preference and not the Constitution that saved a railroad from a presumption of negligence and saved foreign corporations from discrimination. However mystically judges may write of corporate presence and absence, the cases turn on considerations of fairness not too far below the surface for simple men to find. The technicalities are so often merely ways of saying what might be said more clearly in other ways. So perhaps we should be cautious in assuming that the issues here detailed are ones that only lawyers can understand or wisely judge. The safer selection of a distinctive characteristic of the cases catalogued here is that so many of them involve conflicts that appropriately might be resolved by interstate agreements if the states had no common superior to make their agreements for them. This is strikingly true of the cases in which state action was annulled. All but one were concerned with interests which a constitutional convention might deliberately plan to commit to the care of a national court.

THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—IX [1]

XI. CIVIL LIABILITIES

MOST of the cases catalogued in this section have been presented earlier in connection with groupings of the kind of legal or natural person on which the liability is imposed or the kind of enterprise in which the unfortunate defendant is engaged. Many have been repeated in considering the rights of plaintiffs in the course of lawsuits. Whether there is adequate reason for telling the story over again for the third time must be open to question. If the affirmative answer is a mistaken one, the reader has a way of relief no longer open to the writer. Grouped together under the head of liabilities the cases have a common element for the most part, in that they concern statutory changes in common-law rules rather than statutory regulation of matters which the common law left alone. In this they are not wholly unique, but the fact remains that they have significance as indicating the extent to which court law of torts and contracts is sought to be superseded by legislative law in such a way that some one objects and carries his objection to the United States Supreme Court. While it is said that the Constitution does not prevent the state legislatures from changing the common law, it is clear that the Supreme Court does not permit them to change it as they please. Here as elsewhere trivial matters reach Washington, and issues couched in technical terms get resolved by fallible human judgment of what is fair.

The cases to follow are so heterogeneous that they defy any

[1] For previous installments, see 17 VA. L. REV. 529-556, 653-675, 765-799, 18 VA. L. REV. 1-36, 131-169, 270-305, 379-414, 481-509.

neat grouping. Analysis might pick some consanguineous problems or subject matters that could be pocketed together if it had not been thought more desirable to deal with each case as a separate unit. Picking points out of a case and dealing with them as points has the disadvantage of missing their relation to the whole case of which they are a part. The order of presentation here chosen is influenced sometimes by one consideration and sometimes by another. The determinant of contiguity is usually either the kind of legal problem or the kind of enterprise involved. The cases are so few that the order does not greatly matter. If any case feels lonely in the place assigned it, it can invoke the consolation that most of its companions may make the same complaint.

In suits on contracts made and to be performed in other states, the approved notion is that the liability is governed by the law of the contract and the remedy is governed by the law of the forum. Where the remedy or the liability is premised on a statute, an issue of due process is raised by the contention that the statute has been given extraterritorial effect. Thus *Aetna Life Insurance Co.* v. *Dunken*[2] holds that the forum cannot award a penalty and counsel fee by applying its own statute to a contract of another state whose law adds no such frosting to the cake. *James-Dickinson Farm Mortgage Co.* v. *Harry*[3] suggests a doubt whether a presumption derived from the statute creating the liability can be applied by an outside forum. This was a case removed to a federal court and questions of common law were open, so this may have been only a common-law doubt. While it was only as a matter of common law that the case held that a statute giving exemplary damages could be enforced in another bailiwick, the court could hardly find constitutional objections to its own common-law rule. The suit was one in tort, and Mr. Justice Brandeis gave as a reason for allowing the action that "to modify the substantive and procedural law so that recovery

[2] 266 U. S. 389, 45 Sup. Ct. 129 (1924), *supra,* pages 140, 256, discussed in 38 HARV. L. REV. 804, 826; 20 ILL. L. REV. 72, 822; 23 MICH. L. REV. 643, 665; and 3 TEX. L. REV. 286.

[3] 273 U. S. 119, 47 Sup. Ct. 308 (1927), *supra,* pages 235-236, considered in Robert E. Jackson, *What Price "Due Process?",* 5 N. Y. L. 435; and notes in 21 ILL. L. REV. 813; 25 MICH. L. REV. 903; and 36 YALE L. J. 882.

may be had in tort for a breach of a contract, is well within the power of the state," without considering whether added difficulty was created when a tort action was brought in another state and removed to a federal court. The inference must be that such a change must be the creation of a substantive liability in tort which another state may enforce. A different question would arise if a forum applied its own statute to allow remedy in tort for what was only a breach of contract by the law of the *situs*. Would this be merely matter of remedy or enough a matter of the substance of the liability so that it would be as unconstitutional for a forum to apply its own statute to change a breach of contract to a tort as to apply it to add a penalty when no penalty would have been awarded if the transitory cause of action had stayed at home? The penalty statute in the *Aetna* case [4] was one directed only at suits on insurance policies and not at rights of action generally. Suppose a statute of the forum allowed counsel fees in all actions. Would this be applicable to imported causes of action as matter pertaining to the remedy rather than to the right? To ask this question is not to answer it, though even harder questions yielded answers from the asking in the days of a former Chief Justice when he wrote the opinions of the court.

In a suit on a Mexican contract of insurance on which by agreement of the parties, and in accordance with Mexican law to which the policy was expressly made subject, there was to be no suit brought or demand made after a period of one year from the time when damage or loss was suffered, a Texas court entered judgment in a suit brought after the termination of that period, and invoked in justification a Texas statute declaring invalid any stipulation which limited the bringing of suits to a shorter period than two years. This was reversed in *Home Insurance Co.* v. *Dick* [5] in which Mr. Justice Brandeis declared that the effect of the Texas statute as here applied was to impose a liability where none was imposed by the appropriate law. The Texas statute, he insisted, "deals neither with the kind of remedy available, nor with the mode in which it is to be pur-

[4] Note 2, *supra*.
[5] 281 U. S. 397, 50 Sup. Ct. 338 (1930), *supra*, page 256.

sued." Instead, "it purports to create rights and obligations." It cannot be applied here, because "it may not validly affect contracts which are neither made nor to be performed in Texas." The case was brought in the Texas court by garnishment proceedings directed against other foreign corporations which had reinsured part of the risks in suit. Their alleged indebtedness to the main defendant not brought into court was predicated upon their liability to the main defendant on the reinsurance contract. If the original policy was dead, there was no such liability. The ruling that the Texas statute could not resuscitate a dead liability thus operated to hold that the Texas court was without jurisdiction because the garnishees were not debtors of the primary insurer.

The power of the legislature by a curative statute to remedy the defect in a levy of a special assessment due to the fact that the district in question overlapped another district was affirmed in *Charlotte Harbor & Northern Railway Co.* v. *Wells*[6] which thereby deprived the property owner of a defense which he might have had against the assessment as originally levied. Mr. Justice McKenna distinguishes such a curative statute from an unconstitutional effort to authorize the collection of tolls on a canal after the transit. The complainant had sought to bring itself within a case frustrating such toll gathering and had urged what Mr. Justice McKenna called "ingenious and attractive" argument in support of the distinction between a curative and a creative statute. The charm of the argument was not, however, sufficient to deter Mr. Justice McKenna from saying that "we are not disposed to review it in detail." He called the toll statute an attempt "to turn a gratuity conferred and enjoyed into a legal obligation." He found that the ratification of the assessment in question came within "the general and established prop-

[6] 260 U. S. 8, 43 Sup. Ct. 3 (1922). On alleged interference with vested rights by statutory revival of an action already barred by the statute of limitations, see notes in 24 COLUM. L. REV. 803; 10 CORNELL L. Q. 212; 19 ILL. L. REV. 355; 9 MINN. L. REV. 153; 93 U. PA. L. REV. 99; 14 VA. L. REV. 68; and 34 YALE L. J. 303. On cutting off vested right to life pension under workmen's compensation laws by later statute providing for suspension upon recovery, see 25 COLUM. L. REV. 470. Retroactive interference with alleged vested rights belongs for the most part in a separate study to be made later of decisions interpreting the obligation-of-contracts clause.

osition" that "what the legislature could have authorized it can ratify, if it can authorize at the time of ratification." The last condition was satisfied by the established canon that special assessments may be levied for work already completed.

The liability of directors of banks to depositors which was sanctioned in *Ferry* v. *Ramsey*[7] was based upon a statute of Kansas which, while professing to predicate liability upon the assent of the director to the receipt of a deposit after knowledge that the bank was insolvent, was applied by the Kansas court to a case in which a director was so ill that he could not have had knowledge of the condition of the bank or the receipt of the deposit. This was achieved by application of a section of the statute that created from the insolvency of the bank a *prima facie* presumption that the director with knowledge of such insolvency assented to the deposit. The majority of the court through Mr. Justice Holmes sustained the presumption for the reason that the state might have made the directors absolutely liable and had therefore done something less than it might have done. In dissenting, Mr. Justice Sutherland insisted that "the liability of the director must be measured by what the state has enacted and not by what it had power to enact." Under the statute, assent was the basis of the liability, and the state has substituted for proof of consent a presumption from another fact which as applied to the case at bar has no rational relation to consent. Justices Butler and Sanford joined in the dissent. To Mr. Justice Holmes "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." To him "the statute has said if you take the office you must take the consequences of knowledge whether you have it or not." He implied also that the presumption was not wholly preposterous when he said that "as a matter of law there is nothing new in charging a party with knowledge of what it is his duty to know, in this case the insolvency of the bank, or with assent to deposits that he must expect while the bank's door remains open." Mr. Justice Sutherland pointed out that the presumption of assent to receipt of the deposit was based, not on the continued operation of the bank, but

[7] 277 U. S. 88, 48 Sup. Ct. 443 (1928), *supra*, pages 158, 255, discussed in 7 No. CAR. L. REV. 62 and 16 VA. L. REV. 375.

upon the fact of its insolvency, and insisted that there is no rational connection between the fact of insolvency and a director's assent to receipt of deposits, particularly since it was the duty of the bank not to receive deposits under such circumstances. He did not object to another provision of the statute that made it the duty of the directors to know the condition of the bank and created from failure to do as required a conclusive presumption of knowledge of insolvency, and apparently he would have allowed a *prima facie* presumption of assent to the receipt of a deposit to follow from knowledge that the bank was open. He also granted the power of the state to impose an absolute liability on the director for deposits received while it was insolvent.

A presumption from the fact of injury that a railroad and its employees were negligent in the operation of a train was declared unconstitutional in *Western & A. R. Co.* v. *Henderson*[8] when it appeared that the presumption did not merely shift the burden of going forward but remained as evidence to be weighed against the testimony on behalf of the defendant. Mr. Justice Butler declared that the mere fact of the collision at the crossing affords "no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone." He distinguished an earlier similar case on the ground that the presumption of negligence there involved was dissipated as soon as the defendant offered testimony to the contrary. Those who like categories might suggest that a presumption is more than procedural if it can win over competing lies. Those who care for substance may think that presumptions when important are always more than matter of manners. It is perhaps a safe inference from this case that the court would not let a legislature make railroads absolutely liable for injuries due to collision at highway crossings,[9] even though the justices are divided on the issue

[8] 279 U. S. 639, 49 Sup. Ct. 445 (1929), *supra*, page 260, discussed in 17 CALIF. L. REV. 580 and 43 HARV. L. REV. 100. On the statute involved in the case, see W. W. Venable, *Mississippi's Prima Facie Statute*, 2 MISS. L. REV. 384.

[9] For consideration of statutory creation or regulation of liability, see William Hemingway, *The Mississippi Sign Law* [making property employed in a business liable for debts], 6 TENN. L. REV. 95; and notes on making tel-

whether a presumption gains legitimacy when the facts from which it arises are facts which might be made the substantive basis of liability.

A judgment for fraud was sustained in *James-Dickinson Farm Mortgage Co.* v. *Harry*[10] notwithstanding several complaints directed at the Texas statute on which the liability was premised. To the contention that the statute denied due process because it made every stockholder of a corporation severally liable for the whole wrong though this might be in excess of any benefit derived and be independent of any individual participation in the wrong, Mr. Justice Brandeis, after remarking that "at common law every member of a partnership is subject to such a liability * * * and often stockholders of corporations are made similarly liable by statute," answered that in the case at bar the defendants had participated in the deception and the fruits thereof. A complaint that the statute imposed liability for false promises which were material inducements was rejected by pointing out that the state may "modify the substantive and procedural law so that recovery may be had in tort for a breach of contract." The statutory presumption that failure to comply with a promise within a reasonable time satisfies *prima facie* the charge that it was falsely and fraudulently made and puts on the promisor the burden of showing that it was made in good faith, was apparently approved by the comment that "it is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them * * *, and also that it may change the burden of proof," though it was pointed out that the court gave no charge based on this provision of the statute and that it was doubtful whether the provision was applicable to actions outside the forum of the enacting state. The fact that the statute applied only to fraud in transactions in-

ephone company liable for injury caused by poles without proof of negligence, in 8 BOST. U. L. REV. 48; on discrimination against telegraph companies in statute making them absolutely liable for injuries caused by poles, in 41 HARV. L. REV. 96; on making estate of insane person liable for support furnished by state hospital, in 5 NEB. L. BUL. 353; on innkeepers' liability in New York, in 26 COLUM. L. REV. 349; and on liability of railroads for fires, in 3 U. CIN. L. REV. 486 and 4 WIS. L. REV. 49. For liabilities arising from operation of motor vehicles, see note 32 *infra*.

[10] Note 3, *supra*.

volving real estate or corporate stock was held to constitute no denial of equal protection of the laws, since "a statute does not violate the equal protection clause merely because it is not all-embracing" and "a state may direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses." More specifically it was pointed out that "the occasion of the legislation is indicated by the urgency provision of the statute which recites 'that there are now in this state a number of fraudulent land schemes and that a great number of citizens of this state have been defrauded thereby.' "

A statute making an initial carrier liable for loss or damage on the line of a connecting carrier was sustained in *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*[11] where the ruling of the state court that in cases arising under the statute the initial carrier has a right of reimbursement under the general principle of subrogation was regarded by Mr. Chief Justice Taft as a construction of the statute on which liability was premised.

Another provision of the statute allowed the imposition of attorneys' fees as costs in actions in which claims for damages are not adjusted by the carrier within sixty days and also seven per cent interest from the date of filing the claim, except when the shipper fails to recover in his action an amount in excess of any tender made by the carrier. Mr. Chief Justice Taft reviewed at length the cases on attorneys' fees and penalties and said that the general rule established is that carriers may be grouped in a special class on which are imposed fees and penalties as a stimulus to encourage prompt settlement of claims based on facts of which they have peculiar knowledge, but that "such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object, and that the imposition of penalties or conditions that are plainly arbitrary and oppressive, and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it." He noted that the same statute has been held constitutionally applicable to one state of facts and in-

[11] 260 U. S. 35, 43 Sup. Ct. 55 (1922). On the point of the case with regard to penalties, see notes in 23 COLUM. L. REV. 185; 21 MICH. L. REV. 686; 71 U. PA. L. REV. 276; and 33 YALE L. J. 401. On discrimination against dangerous occupations in statute imposing penalty for delay in paying judgment under Arizona Workmen's Compensation Act, see 38 HARV. L. REV. 110.

applicable to another. Here the plaintiff sued for about $2000 damages and $900 attorneys' fees. The jury awarded it about $800 damages and the trial judge awarded it $600 attorneys' fees. The state supreme court reduced the damages by $200 and the fees by $400, but awarded a further $100 as attorneys' fees for the work on appeal. This latter the Supreme Court held to be unconstitutional because the carrier ought not to be compelled to contribute to the cost of resisting its own "successful effort on appeal to reduce an unjust and excessive claim against it." The imposition of the other fees and the seven per cent interest was sustained. The amount was thought reasonable and the carrier was not put to the hazard of the outcome of a lawsuit which it could not reasonably foresee. There were seventy-two different claims in the case which took four days to try. It does not appear whether the carrier on appeal conceded a liability to a certain amount or contested the whole judgment. Apparently it does not matter, and so a carrier who contests the whole case on appeal and wins in part and loses in part cannot be compelled to pay additional fees though judgment goes against it. If at the beginning it contests the whole case and induces the jury to lop off $1200 from the plaintiff's claim, the Constitution permits the court to add an attorney fee. If on appeal it gets a further cut of $200, the Constitution protects it from an attorney fee. It surely cannot be said that the framers and ratifiers of our Fourteenth Amendment were wholly devoid of a fine sense of delicate discrimination.

Another statute applicable to claims against carriers set limits to the time of presenting claims and commencing suit and provided also that upon failure by the carrier to pay or reject the claim within ninety days after presentation "such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier and may be recovered in any court having competent jurisdiction." This was sustained in *Southern Ry. Co.* v. *Clift* [12] in which the state court had denied to the company the right to defend the case either as to liability or quantum of damage. Mr. Justice McKenna pointed out the special reasons which made it reasonable to select carriers for

[12] 260 U. S. 316, 43 Sup. Ct. 126 (1922).

special duties with respect to claims for damages and declared that the company was accorded ample time for investigation and could by notice of rejection contest the claim in the courts without handicap. He interpreted the statute as not dispensing with proof on the part of the plaintiff, though he had recited that judgment had been rendered "upon the pleadings in the case." After stating some precedents he concluded:

> "In attempting to minimize these cases, or exclude them from authority, it seems to be contended, certainly implied, that, by the statute, in case of suit by a claimant, he is excused from establishing his claim. The contention is untenable. The statute is clear and direct in its requirements. If the claim is just, there is no injustice in requiring its payment; if the claim is deemed by the company to be unjust, the statute requires a declaration of the fact by its rejection. Upon rejection, suit, of course, must be brought for it, and it must be established. No penalty is imposed for its rejection, nor increase of its amount in consequence of its rejection." [13]

By a provision of a Kentucky co-operative marketing statute, a co-operative association was given a right of action for a $500 penalty and a reasonable attorney's fee against any one who knowingly aided a member of the association to break his contract by delivering to others any products that he had undertaken to sell to the association. In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association,*[14] Mr. Justice McReynolds declared it unnecessary to determine "whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe." After affirming the constitutionality of the co-operative statute involved, he said that "the provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan" and he declared it reasonable to treat such marketing contracts between the association and its members as of a separate class in legislating against probable interference with them. For all that appears, the objections to the penalty and attorney's fee were predicated

[13] 260 U. S. 316, 322 (1922).

[14] 276 U. S. 71, 48 Sup. Ct. 291 (1928), *supra,* pages 176-180, 252.

upon general objections to restraint upon liberty to contract with those who had made inconsistent contracts with others.

A statute permitting a jury to assess punitive damages against an employer for a death caused by the negligence of his employee was sustained in *Pizitz Dry Goods Co.* v. *Yeldell* [15] in which Mr. Justice Stone adduced the provision for setting aside the verdict if it is "induced or reached on account of prejudice, passion or other improper motive or cause" and said:

> "Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented." [16]

Workmen's compensation acts were sustained and applied in a number of cases dealt with in more detail in the section on Industrial Relations. The imposition of liability for injuries to employees while crossing railroad tracks on their way to work was sustained when it appeared that this was a necessary or approved avenue of approach to the plant of the employer.[17] Liability may be enforced in favor of non-resident alien dependents

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[15] 274 U. S. 112, 47 Sup. Ct. 509 (1927).

[16] 274 U. S. 112, 115-116 (1927).

[17] Cudahy Packing Co. v. Parramore, 263 U. S. 418, 44 Sup. Ct. 153 (1923), *supra,* pages 223-225; Bountiful Brick Co. v. Giles, 276 U. S. 154, 50 Sup. Ct. 242 (1928), *supra,* pages 226-227.

of a deceased employee.[18] In an elective compensation act, the finding of facts by the commission may be made final if there is any evidence to support them.[19] Employers who are relieved from paying direct compensation for deaths of employees who leave no dependents may be required to contribute to funds to be used to add to the compensation of employees whose second intrinsically partial disability imposes a total disability and to funds to be used for rehabilitation of employees.[20] These contributions are not devoted specifically to employees of the contributing employer.

Employers who make these contributions may have a right of action for reimbursement against third parties whose negligence is responsible for the death of the employee. This was applied to a case in which the reason why the employer had to contribute to the special fund was that the wrongdoer had saved him from making direct compensation for the injury by himself paying more than the compensation provided by the act.[21] Thus the wrongdoer, solely because he paid more than the statutory compensation required of the employer, had to pay an additional amount to the employer to reimburse him for his payment to the special fund. Had the wrongdoer paid less than full compensation, there could have been no demand on him for this added payment to the special fund.

A decision of a state court that an express company which had taken over the assets of another and paid therefor in its own stock is liable for the debts incurred by its predecessor was sustained in *American Railway Express Co.* v. *Kentucky*[22] for the primary reason that no statute was involved and that therefore the case came within the established rule that "a merely errone-

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[18] Madera Sugar Pine Co. v. Industrial Accident Commission, 262 U. S. 499, 43 Sup. Ct. 604 (1923), *supra,* pages 226-227.

[19] Booth Fisheries Co. v. Industrial Commission, 271 U. S. 208, 46 Sup. Ct. 491 (1926), *supra,* pages 231-232.

[20] Sheehan Co. v. Shuler, 265 U. S. 371, 44 Sup. Ct. 548 (1924), *supra,* pages 227-228; New York Street Railways v. Shuler, 265 U. S. 379, 44 Sup. Ct. 551 (1924), *supra,* pages 228-229.

[21] Staten Island R. T. R. Co. v. Phoenix Indemnity Co., 281 U. S. 98, 51 Sup. Ct. 242 (1930), *supra,* pages 229-231.

[22] 273 U. S. 269, 47 Sup. Ct. 353 (1927), *supra,* page 237, discussed in 28 COLUM. L. REV. 619.

ous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." Mr. Justice McReynolds went on, however, to say that there is nothing arbitrary or obviously contrary to the principles of justice in holding the defendant liable under the facts of the case, and added that "it seems clear that the state, without conflict with the Fourteenth Amendment, might have enacted through its legislative department a statute of precisely the same effect as the rule of law and public policy declared by the court of appeals, and its decision is just as valid as such a statute would have been." In support he adduced a case "which upheld the validity of a statute providing for service of process after a corporation had ceased to do business within and had withdrawn all agents from the state" and cases "which sustained the power of a state to impose liability for the seller's debts upon a purchaser of merchandise in bulk." Justices Sutherland and Butler dissented, without opinion.

An employer who objected to subjection of wages due to employees to a lien in favor of judgment creditors of the employee was left comfortless in *Endicott-Johnson Corporation* v. *Encyclopedia Press*.[23] The chief objection urged was that the judgment debtor after execution unsatisfied had no notice of these proceedings against the garnishee, but the employer urged also that the requirement interfered with his liberty of contract. Mr. Justice Sanford answered that he remained free to make such contracts as he chose, and that all the statute did was to subject a portion of the proceeds of such contracts to liability for the debts of the employee to whom the proceeds were due. A complaint against being subjected to additional book-keeping expense was declared to be plainly without merit.

Though apparently the ultimate liability of a stockholder in a bank was not one of the contested issues in *Coffin Brothers & Co.* v. *Bennett*,[24] Mr. Justice Holmes remarked that "the plaintiffs in error by becoming stockholders had assumed the liability on

[23] 266 U. S. 285, 45 Sup. Ct. 61 (1924), *supra*, page 248. The same decision is rendered in Endicott-Johnson Corporation v. Smith, 266 U. S. 291, 45 Sup. Ct. 63 (1924).

[24] 277 U. S. 29, 48 Sup. Ct. 422 (1928), *supra*, pages 157, 247.

which they are to be held." The quarrel was over the mode of enforcing the liability. Initiation of the proceedings by administrative execution and consequent lien was sustained because the defendant by affidavit of legality could turn the proceedings into a lawsuit in which all defenses were open to him.

The question whether stock in a bank may be assessed to restore impaired capital without notice to the stockholder was left undecided in *Toombs* v. *Citizens Bank* [25] because it did not appear that the statute dispensed with notice and therefore, under the common-law rule, reasonable notice should be given even though not required by statute or by-laws. In this case notice was in fact given by mail fifteen days prior to the meeting, though it was not disclosed whether the notice was received by the protesting stockholder. The statute made it the duty of the officers and directors to "call a special meeting of the stockholders." Mr. Justice Stone invokes the canon that a statute will be so construed, if possible, as to save it from unconstitutionality, and he says that on the record the court "cannot assume that notice was not required by the law of the state." Thus we are left in some doubt as to whether some provision for notice is a constitutional prerequisite to a valid assessment. The assessment was a voluntary one on the part of the corporation. If not made, the superintendent of banks was authorized to liquidate the bank and assess the stock under another provision of the statutes.

A bank which objected to an order to pay the deposit of an absconding husband to his dependents in proceedings which did not bind the depositor if he could successfully contest the jurisdictionary facts on which the order was premised was denied relief in *Corn Exchange Bank* v. *Coler* [26] in which Mr. Justice McReynolds said:

> "That the appellant bank under some remote possibility may be called upon to pay a second time is true; but when voluntarily contracting with the depositor it knew this and accepted the consequent responsibility. Under the approved

[25] 281 U. S. 643, 50 Sup. Ct. 434 (1930), *supra*, page 157.

[26] 280 U. S. 218, 50 Sup. Ct. 94 (1930), *supra*, pages 70-71, 133, 246, discussed in 30 COLUM. L. REV. 257; 15 CORNELL L. Q. 620; and 4 ST. JOHNS L. REV. 293. The decision in the court below is considered in 29 COLUM. L. REV. 669 and 28 MICH. L. REV. 75.

> practice there was abundant opportunity to make defense—to require proof of all essential facts. At all events, its position is not materially worse than that of a debtor who must pay one who holds letters testamentary issued upon proof of death, though in truth the creditor may be alive, with power to repudiate the appointment." [27]

Statutory compulsion to pay to the state all bank deposits which have been quiescent for twenty years when the depositor is not known to bank officials to be alive was sustained in *Security Savings Bank* v. *California* [28] on the basis of earlier precedents. The dispute in the case related to matters of procedure.

A New York requirement that persons engaged in carrying passengers for hire by motor vehicle on streets of cities of the first class must file with the state tax commission a bond or insurance policy to the amount of $2500 to secure the payment of any judgment obtained against the carrier for personal injuries caused by the operation of his vehicle was sustained in *Packard* v. *Banton* [29] against complaints of discrimination and denial of

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[27] 280 U. S. 218, 223.

[28] 263 U. S. 282, 44 Sup. Ct. 108 (1923), *supra*, pages 134, 154-155, 245, discussed in 4 BOST. U. L. REV. 205 and 9 ST. LOUIS L. REV. 149.

[29] 264 U. S. 140, 44 Sup. Ct. 257 (1924), *supra*, pages 40-41, discussed in 22 MICH. L. REV. 717 and 2 TEX. L. REV. 523. On similar cases, see notes in 21 ILL. L. REV. 745; 22 ILL. L. REV. 676; and 71 U. PA. L. REV. 278.

On statutes requiring liability insurance from automobilists, see Minor Bronough, *Compulsory Automobile Liability Insurance,* 29 LAW NOTES 207; James R. Caskie, *Compulsory Automobile Insurance,* 11 VA. L. REG. [N. S.] 449; J. P. Chamberlain, *Protection for Automobile Owners,* 11 A. B. A. JOUR. 451; Wayland H. Elsbee and Harold Hooper Roberts, *Compulsory Insurance against Motor Vehicle Accidents,* 76 U. PA. L. REV. 690; W. J. Heyting, *Automobiles and Compulsory Liability Insurance,* 16 A. B. A. JOUR. 362; Henry Swift Ives, *Compulsory Liability Insurance, with Special Reference to Automobiles,* 10 A. B. A. JOUR. 697, reprinted in 10 VA. L. REG. [N. S.] 666; Robert S. Marx, *Compulsory Automobile Insurance,* 11 A. B. A. JOUR. 731; *Compulsory Automobile Insurance,* 1 U. CIN. L. REV. 445; *Compulsory Automobile Insurance—Compensation, Not Liability Insurance Needed,* 16 NAT. MUN. REV. 503; and *Compulsory Compensation Insurance,* 25 COLUM. L. REV. 164; MacCormack Snow, *Some Legal Aspects of Compulsory Automobile Insurance,* 6 OREG. L. REV. 193; Edward C. Stone, *Some Views on Compulsory Automobile Insurance,* 13 A. B. A. JOUR. 151; and notes in 9 BOST. U. L. REV. 212; 10 BOST. U. L. REV. 72; 27 COLUM. L. REV. 314; 30 COLUM. L. REV. 108; 20 ILL. L. REV. 813; 24 MICH. L. REV. 585; 10 MINN. L. REV. 149, 174; and 35 YALE L. J. 110.

due process. The exemptions of private drivers, of all drivers in smaller cities, and of street-cars and omnibuses subject to the Public Service Commission, were declared to be based on reasonable grounds. Underlying the reasonableness of the classification and of the substantive requirement was the idea that the state as proprietor of the streets may generally prohibit or condition the use of the streets for purposes of gain as it sees fit. The contention that the cost of complying with the statute might be so high as to render the business unprofitable was rejected as not likely to be true as a general rule. The fact that it might be true in individual instances because of circumstances peculiar to the particular person was said not to militate against the constitutionality of the statute. Mr. Justice Sutherland again invokes the special power over streets when he says:

> "Moreover, a distinction must be drawn between the regulation of an activity which may be engaged in as a matter of right, and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former." [30]

A similar requirement of liability insurance to be obtained by operators of motor busses was objected to in *Sprout* v. *South Bend* [31] because the insurance had to be taken out in companies authorized to do business in the state, but Mr. Justice Brandeis called the requirement a reasonable one so far as the operator was concerned and observed that it was not open to him to raise the objection that it discriminates against outside insurance companies. There was a suggestion that it might be questionable under the commerce clause to require insurance for the protection of passengers, but no point was made of this in considering the Fourteenth Amendment. The decision was in favor of the operator on other grounds supported by the commerce clause.[32]

[30] 264 U. S. 140, 145 (1924).

[31] 277 U. S. 163, 48 Sup. Ct. 503 (1928).

[32] Statutory or common-law liabilities of owners of automobiles for injuries due to faults of another are considered in Joseph P. Chamberlain, *Automobiles and Vicarious Liability,* 10 A. B. A. JOUR. 788; W. J. Heyting, *Automobiles and Vicarious Liability,* 16 A. B. A. JOUR. 285; and notes in 29

To make the insurance of the automobilist more securely available to injured persons, New York enacted a statute requiring a clause in the policy to the effect that the bankruptcy or insolvency of the assured shall not release the insurer from liability, and giving a direct action against the company if a judgment against the policy holder is unsatisfied. This was sustained in *Merchants' Mutual Automobile Liability Insurance Co.* v. *Smart*[33] in which Mr. Chief Justice Taft invoked not only the justification of prevention of collusion between the insurer and insured but the primary interest of the injured party which might have justified a requirement that policies should afford him direct protection without interposition of the condition that judgment against the tort-feasor should first be obtained.

Statutes altering the common-law rules of liability are not confined to ones imposing liability where the common law did not. They include also others that take away rights of action which the common law bestowed. Thus *Silver* v. *Silver*[34] sustained a Connecticut statute which provided that gratuitous guests in automobiles may not recover from the owner or operator for injuries due to negligent driving. Mr. Justice Stone declared that it is for the legislature to determine whether there

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COLUM. L. REV. 210; 30 COLUM. L. REV. 563; 38 HARV. L. REV. 512; 43 HARV. L. REV. 493; 26 MICH. L. REV. 584; 27 MICH. L. REV. 462; 28 MICH. L. REV. 73; and 2 WIS. L. REV. 38. The extraterritorial application of statutes imposing such liability is discussed in 30 COLUM. L. REV. 562; 43 HARV. L. REV. 493; 27 MICH. L. REV. 462; and 2 So. CALIF. L. REV. 304.

[33] 267 U. S. 126, 45 Sup. Ct. 320 (1925), *supra*, page 138. On such statutes, see notes in 4 ALA. L. J. 48 and 25 COLUM. L. REV. 661.

[34] 280 U. S. 117, 50 Sup. Ct. 57 (1929), considered in 30 COLUM. L. REV. 258; 28 MICH. L. REV. 928; 14 MINN. L. REV. 412; 2 ROCKY MT. L. REV. 263; 78 U. PA. L. REV. 556; and 16 VA. L. REV. 385. On the case below or on similar cases, see 29 COLUM. L. REV. 354; 42 HARV. L. REV. 702; 14 IOWA L. REV. 243; 28 MICH. L. REV. 57; 13 MINN. L. REV. 608; 8 OREG. L. REV. 274; 77 U. PA. L. REV. 696; and 38 YALE L. J. 267. On common-law liability to gratuitous passengers in automobiles, see 28 MICH. L. REV. 57 and 8 OREG. L. REV. 274.

On other legislative restriction of liability, see Sylvan H. Hirsch, *Limited Liability of Innkeepers under Statutory Regulations*, 76 U. PA. L. REV. 272; and notes in 26 COLUM. L. REV. 349, on innkeepers' liability in New York; and in 34 YALE L. J. 552, on a case holding it unconstitutional to seek to render militia immune from civil liability. In 77 U. PA. L. REV. 1025, is a note on a case holding that a license to build a structure not in aid of navigation is no defense to an action for damages.

were serious evils incident to the enforcement of such liability which justified the determination that it should no longer be allowed. He held it also appropriate to confine the statute to passengers in automobiles and not to extend it to riding guests in other vehicles. "It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs." The lady who lost because of the statute was the wife of the defendant who had gratuitously taken her for a ride.

A Michigan statute declaring that no foreign corporation, subject to its provisions should be capable of making a valid contract in the state until it complied with requirements of registration, was applied in *Hemphill* v. *Orloff* [35] to sustain the Michigan court in holding that such an unregistered corporation could not maintain an action on a contract made within the state. Mr. Justice McReynolds quotes this holding of the state court without indicating whether it was confined to capacity to sue in the courts of the state. We are, therefore, not certain that the case establishes that the statute confers upon dealers with such pariahs an immunity from liability to which other states would have to give effect under the due process or the full faith and credit clause. The defeated plaintiff in the case was a Massachusetts trust with enough of the attributes of a corporation so that it was held proper for other states to regard it as it regarded corporations.

All but five of the cases presented in this section have been considered earlier. Of these five, only *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.* [36] frustrated the application of a statute. This held without dissent that attorney fees could not be awarded to a plaintiff on an appeal in which the verdict below was not sustained in full. The four other cases sustained statutes retroactively correcting a defect in a special assessment,[37] depriving carriers of the right to defend claims unless within

[35] 277 U. S. 537, 48 Sup. Ct. 577 (1928), *supra*, pages 190-191, 241, considered in 16 CALIF. L. REV. 548; 14 CORNELL L. Q. 70; 23 ILL. L. REV. 717; 27 MICH. L. REV. 317; 15 VA. L. REV. 249, 271; and 5 WIS. L. REV. 174. The decision in the lower court is discussed in 41 HARV. L. REV. 86.

[36] Note 11, *supra*.

[37] Charlotte Harbor & Northern Railway Co. v. Wells, note 6, *supra*.

ninety days of notice thereof they give notice of rejection,[38] authorizing imposition of punitive damages against an employer for deaths caused by negligence of his employee,[39] and relieving automobile drivers of liability to gratuitous guests for injuries due to negligence.[40] All were unanimous. Though given earlier, perhaps *American Railway Express Co.* v. *Kentucky*[41] belongs primarily here. Here Justices Sutherland and Butler dissented from a decision sanctioning a judgment against a successor express company for a liability of its predecessor. The other cases may rest content without concluding comment.

XII. METHODS OF ENFORCEMENT

Except for some of the cases on criminal prosecution, the decisions included in this section have already been reviewed earlier. There is possible danger in grouping them here, for the propriety of a mode of enforcing a regulation is closely related to the kind of regulation and the kind of public or private interest involved. Here as elsewhere, adjective and substantive are more interdependent than some concoctors of categories would lead one to suppose. With this warning, there may be advantages in running hurriedly over the objections that have been levelled primarily at the way in which a legislative command is enforced rather than at the coercion or restraint which obedience to the command would involve.

Where the line between good and evil is a difficult one to mark and where evil may often masquerade as good, it is established that the police power may sometimes extend beyond the area of actual evil in order to make more certain that no evil will escape. This idea is invoked by Mr. Justice Sutherland in *Euclid* v. *Ambler Realty Co.*[42] to justify blanket restrictions on industrial plants in designated neighborhoods even though some of the plants might be individually innocuous. Mr. Justice Sanford

[38] Southern Ry. Co. v. Clift, note 12, *supra.*
[39] Pizitz Dry Goods Co. v. Yeldell, note 15, *supra.*
[40] Silver v. Silver, note 34, *supra.*
[41] Note 22, *supra.*
[42] 272 U. S. 365, 47 Sup. Ct. 114 (1926), *supra,* pages 104-113. See especially pages 110-111.

suggests the same notion in *Gitlow* v. *New York*[43] in holding that some speech may be punished although it is not shown to have caused immediate harm. A spark may be extinguished to safeguard against conflagration. A stitch in time saves nine. In other cases a similar excuse was not accepted. A flat prohibition of price discrimination in purchases of milk cannot be sustained as a means of preventing monopoly and restraint of trade, since such practices do not necessarily tend to monopoly and it is feasible to confine the prohibition to discrimination in aid of such ultimate vice.[44] Maximum weights cannot be set for loaves of bread as a means of preventing fraud against customers who may mistake a large small loaf for a small large one.[45] The state cannot exclude all shoddy from a puff or comfortable in order to ensure that no unsterilized shoddy finds its way in.[46] Doubtless many of our other cases might be regarded as ones dealing with the propriety of adopting special means toward the attainment of a more general end, but this would get us into philosophical difficulties and would add more repetition to the plenitude of repetition already committed.[47]

Questions of the delegation of power to officials or private persons and of the exercise of such delegated power arose in a few cases. The legislature may delegate to a municipality the power to decide as to the necessity of taking land for use as a reservoir,[48] and may delegate to public trustees the power to determine needed expenditures to operate a traction system leased by

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[43] 268 U. S. 652, 45 Sup. Ct. 625 (1925), *supra,* pages 53-57, especially pages 54-55.

[44] Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 Sup. Ct. 507 (1927), *supra,* pages 168-171.

[45] Burns Baking Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924), *supra,* pages 87-90.

[46] Weaver v. Palmer Brothers Co., 270 U. S. 402, 46 Sup. Ct. 320 (1926), *supra,* page 121.

[47] Possibly mention should be made of the point in Bryant v. Zimmerman, 278 U. S. 63, 49 Sup. Ct. 61 (1928), *supra,* pages 64-65, that a statute requiring certain secret organizations to register with the secretary of state may provide for punishment of members who participate in the organization with knowledge that the requirement has not been complied with.

[48] Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 43 Sup. Ct. 684 (1923), *supra,* pages 23-24.

the state from private owners.[49] A board of health may be given power to decide when exclusion of unvaccinated children from public or private schools is necessary for the public health.[50] A complaint that power vested in a commission to relax the restrictions of a zoning ordinance was void because it enabled them to discriminate arbitrarily between individuals was answered by saying that the delegation itself is not unconstitutional and that it will be time enough to complain when it is contended that the discretion is in fact exercised capriciously.[51] On the other hand, delegation to neighboring property owners of power to determine whether a philanthropic home should be maintained in their midst was held unconstitutional in a case [52] which professed to go on the ground of the invalidity of the delegation but which is hardly to be differentiated from other cases on that ground alone. Legislative authority is not delegated to private persons because a state entomologist is to make investigation upon the petition of ten or more reputable freeholders.[53] Here the order of the entomologist for the destruction of trees was subject to judicial review, which may explain why apparently there was no objection of unconstitutional delegation of power to him. An issue of the finality of an administrative determination arose in a workmen's compensation case in which it was held that in an elective act the administrative finding of facts may be made final where there is any evidence to support it.[54] Whether the result would be different in the administration of a compulsory act was not disclosed.

The procedure provided for the granting or revocation of occupational licenses was unsuccessfully contested in four cases.

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[49] Boston v. Jackson, 260 U. S. 309, 43 Sup. Ct. 129 (1922), *supra,* pages 22, 30.

[50] Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24 (1922), *supra,* pages 71-72.

[51] Gorieb v. Fox, 274 U. S. 603, 47 Sup. Ct. 675 (1927), *supra,* pages 111-113.

[52] Washington v. Roberge, 278 U. S. 116, 49 Sup. Ct. 50 (1928), *supra,* pages 116-117.

[53] Miller v. Schoene, 276 U. S. 272, 48 Sup. Ct. 246 (1928), *supra,* pages 100-101.

[54] Booth Fisheries v. Industrial Commission, 271 U. S. 208, 46 Sup. Ct. 491 (1926), *supra,* pages 231-232.

Bratton v. *Chandler* [55] avoided a constitutional doubt by assuming that the statute would be construed to give to the applicant an opportunity to meet any evidence procured by the board of its own motion. *Hurwitz* v. *North* [56] held it unobjectionable to withhold the power to subpoena witness who would not voluntarily attend a proceeding to consider revocation of a license, so long as both the board and the physician were alike confined to the use of depositions. *Lehmann* v. *State Board of Public Accountancy* [57] held that the mere absence of announced rules of procedure for the revocation of a certificate did not render a board powerless to proceed. The certificate was not a prerequisite to practice but a mere honorific badge of merit. The court said that it would not assume that the board would not proceed fairly in its hearing. So also in *Douglas* v. *Noble* [58] the failure of a statute to specify the standard to be applied by a board in passing on the qualifications of those desiring to become dentists was condoned when it appeared from the state decision that the board was not vested with arbitrary power.

Some other rulings may be briefly recited. Where interference with a co-operative marketing contract may be forbidden, an action may be given for a penalty and attorney fee.[59] An attorney fee may be awarded to a plaintiff who in the trial court recovers more from a carrier than the defendant concedes to be due although less than the plaintiff claims, but no such fee may be given on an appeal in which the appellee is but partially successful.[60] A carrier which does not pay or reject a claim within ninety days of its presentation may be denied the right to defend in a subsequent action.[61] Enforcement of claims for damages

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[55] 260 U. S. 110, 43 Sup. Ct. 43 (1922), *supra,* pages 79-80.

[56] 271 U. S. 40, 46 Sup. Ct. 384 (1926), *supra,* pages 80-81.

[57] 263 U. S. 394, 44 Sup. Ct. 128 (1923), *supra,* page 81.

[58] 261 U. S. 165, 43 Sup. Ct. 303 (1923), *supra,* page 78.

[59] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 1, 48 Sup. Ct. 291 (1928), *supra,* pages 176-180, 252-254.

[60] Chicago & N. W. R. Co. v. Nye Schneider Fowler Co., 260 U. S. 35, 43 Sup. Ct. 55 (1922), *supra,* page 270.

[61] Southern R. Co. v. Clift, 260 U. S. 316, 43 Sup. Ct. 126 (1922), *supra,* page 271.

due to defective fertilizer may be conditioned on prior submission of a sample of the fertilizer to inspection by a public official.[62] To make effective a statutory duty to accept or reject an application for hail insurance within a designated time, companies may be forbidden to stipulate by contract for a larger freedom.[63] Private contracts with public utilities may be abrogated as a means of preventing discrimination between patrons.[64] As an encouragement to extra care, employers may be subjected to punitive damages for deaths caused by the negligence of their employees.[65]

Control over motor carriers and over automobilists raised a number of points of procedure. *Michigan Public Utilities Commission* v. *Duke* [66] and *Frost & Frost Trucking Co.* v. *Railroad Commission* [67] hold that power over private carriers may not be enforced by subjecting them to control which in effect puts them in the category of public carriers. *Packard* v. *Banton* [68] and *Sprout* v. *South Bend* [69] sustain requirements that operators of motor vehicles for hire must give bonds or take out insurance to secure payment for injuries subjecting them to liability. *Hess* v. *Pawloski* [70] establishes that non-resident automobilists may be subjected to suit by service on a state official in causes of action arising out of their travel within the state, pro-

[62] Jones v. Union Guano Co., 264 U. S. 171, 44 Sup. Ct. 280 (1924), *supra,* pages 122, 240.

[63] National Union Fire Insurance Co. v. Wanberg, 260 U. S. 71, 43 Sup. Ct. 32 (1922), *supra,* pages 136-137. Perhaps mention should be made of Merchants' Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 45 Sup. Ct. 320 (1925), *supra,* pages 138, 279, which made an insurer's liability to the insured effective in favor of persons injured by the assured by giving a direct action against the insurer if judgment against the insured remained unsatisfied.

[64] Stimson Lumber Co. v. Kuykendall, 275 U. S. 207, 48 Sup. Ct. 1 (1927), and Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 49 Sup. Ct. 325 (1929), *supra,* page 134, note 20.

[65] Pizitz Dry Goods Co. v. Yeldell, 274 U. S. 112, 47 Sup. Ct. 509 (1927), *supra,* page 273.

[66] 266 U. S. 570, 45 Sup. Ct. 191 (1925), *supra,* pages 39-40.

[67] 271 U. S. 583, 46 Sup. Ct. 605 (1926), *supra,* pages 36-39.

[68] 264 U. S. 140, 44 Sup. Ct. 257 (1924), *supra,* pages 41, 277.

[69] 277 U. S. 163, 48 Sup. Ct. 503 (1928), *supra,* page 42, note 31, and page 278.

[70] 274 U. S. 352, 47 Sup. Ct. 632 (1927), *supra,* pages 42-43, 238.

vided adequate notice to the non-resident is secured by statute. *Wuchter* v. *Pizzuti*[71] insists that the provision for such actual notice must be a part of the statutory plan.

Like non-resident automobilists, foreign corporations may be subjected to the jurisdiction of the courts by service on a state official in causes of action arising out of business done within the state. For doing business without compliance with statutory prerequisites, they may be denied admittance to the state courts to prosecute claims arising out of such business. Thus the requirement of registration is enforced in two ways. The cases are collected in the section on Incidents of Rights of Action,[72] and incorporation by reference is better than repetition here. A similar restraint may be practiced with reference to procedure for foreclosing a mortgage,[73] for compelling banks to yield unclaimed deposits[74] or the deposit of an absconding husband,[75] for collecting assessments from stockholders of insolvent banks,[76] and for charging employers with liability in garnishment of wages.[77] Nor is repetition necessary with respect to such matters of civil judicial procedure as have been catalogued in considering rights of action.[78]

The use of presumptions on behalf of the state in criminal prosecutions was condoned in one case and condemned in another. *Cockrill* v. *California*[79] found it not fanciful or unrea-

[71] 276 U. S. 13, 48 Sup. Ct. 259 (1928), *supra,* pages 43, 238-239.

[72] See cases cited in notes 2, 3, 5, 6, 7, 8, 9, 10, 13, 23, and 25 in section on Incidents of Rights of Action, *supra,* pages 234-262.

[73] Scott v. Paisley, 271 U. S. 632, 46 Sup. Ct. 591 (1926), *supra,* pages 133-134, 247-248.

[74] Security Savings Bank v. California, 263 U. S. 282, 44 Sup. Ct. 108 (1925), *supra,* pages 134, 154-155, 245-246, 277.

[75] Corn Exchange Bank v. Coler, 280 U. S. 218, 50 Sup. Ct. 94 (1930), *supra,* pages 70-71, 133, 246, 276.

[76] Coffin Brothers v. Bennett, 277 U. S. 29, 48 Sup. Ct. 422 (1928), *supra,* pages 157, 275.

[77] Endicott Johnson Corporation v. Encyclopedia Press, 266 U. S. 285, 45 Sup. Ct. 61 (1924), and Endicott Johnson Corporation v. Smith, 266 U. S. 291, 45 Sup. Ct. 63 (1924), *supra,* pages 248, 275.

[78] See cases cited in notes 18, 20, 27, 28, 30, 31, 42, 44, 46, 50, 53, 54, 56, 57, 58 and 59, in section on Incidents of Rights of Action, *supra,* pages 234-262.

[79] 268 U. S. 258, 45 Sup. Ct. 490 (1925), *supra,* page 126.

sonable to raise a *prima facie* presumption of intent to participate in a forbidden transfer of land from the fact that property was taken in the name of one entitled to hold it when the consideration was paid by one not so entitled. *Manley* v. *Georgia*[80] on the other hand declared that the mere fact of the insolvency of a bank is no ground for raising a presumption of fraud on the part of officers which they can rebut only by showing that the business has been fairly and legally administered and with the same care generally that fiduciaries are bound by law to observe. To the lack of rational connection between insolvency and fraud was added the considerations that the legal definition of insolvency raised difficult technical questions and that the burden of rebutting the presumption was peculiarly onerous.

The mode of seizing and confiscating intoxicating liquor and vehicles employed in transporting it was unsuccessfully called in question in two cases. The Georgia statute sustained in *Samuels* v. *McCurdy*[81] put a legal end to all possession of liquor for beverage purposes. Such liquor might be taken under a search warrant and destroyed upon the order of a court without giving to the owner any notice or hearing before the judicial order of destruction. This was sustained by Mr. Chief Justice Taft by citation of a case sanctioning the administrative destruction of nets unlawfully in public waters and by pointing out that the owner who contended that his liquor was held for one of the limited purposes allowed by statute might resort to suit to obtain possession and to enjoin the destruction as did the complainant in the case at bar. There was dissent from Mr. Justice Butler in an opinion which did not refer to the procedural elements in the seizure and destruction.

Forfeiture of an innocent owner's vehicle used by another in the transportation of liquor was sanctioned in *Van Oster* v. *Kansas*[82] where the trial on the issue was before a judge without a jury and the alleged transporter was subsequently acquitted by a jury. The decision did not apply to vehicles used

[80] 279 U. S. 1, 49 Sup. Ct. 215 (1929), *supra,* pages 255-256, note 55.
[81] 267 U. S. 188, 45 Sup. Ct. 264 (1925), *supra,* pages 91-92.
[82] 272 U. S. 465, 47 Sup. Ct. 133 (1926), *supra,* pages 93-94.

without the owner's consent, though the statute was broad enough to require forfeiture in such a case.

For the vice of indefiniteness, criminal statutes were declared void in two cases. *Connally* v. *General Construction Co.*[83] found doubly indefinite a command to contractors on work for the state to pay "not less than the current rate of *per diem* wages in the locality where the work is performed." *Cline* v. *Frink Dairy Co.*[84] condemned a statute regulating combinations and conspiracies to restrict trade because its prohibitions did not apply to agreements to secure only a reasonable profit when this could not be obtained without the aid of the combinations otherwise prohibited. This criterion of reasonableness was thought to be too vague to afford a guide to conduct. On the other hand, the definition of criminal syndicalism in the California statute was said by Mr. Justice Sanford in *Whitney* v. *California*[85] to be "specific" and to require of the defendant "no 'prophetic' understanding of its meaning." So also in *Hygrade Provision Co.* v. *Sherman*[86] the term "kosher" was thought to have a meaning well enough defined to enable one engaged in the trade to apply it correctly.

Objections to alleged vagueness in two statutes were rejected because of somewhat more special considerations. In *Miller* v. *Schoene,*[87] which sustained a statute compelling the destruction of certain trees, Mr. Justice Stone in answer to the complaint of vagueness said that the state court had held the statute applicable "and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability." In *Gorieb* v. *Fox*[88] a set-back ordinance fixed a line at least as far from the street as that occupied by sixty per cent of the existing houses in the block. Mr. Justice Sutherland refused to weigh doubt as to the ascertainment of this line because in the case before him a permit had

[83] 269 U. S. 385, 46 Sup. Ct. 126 (1926), *supra,* pages 29-30, 220, note 32.
[84] 274 U. S. 445, 47 Sup. Ct. 681 (1927), *supra,* pages 172-175.
[85] 274 U. S. 357, 47 Sup. Ct. 641 (1927), *supra,* pages 57-60.
[86] 266 U. S. 497, 45 Sup. Ct. 141 (1925), *supra,* page 90.
[87] Note 53, *supra.*
[88] Note 51, *supra.*

been granted by the zoning board with authority to waive the limitation in the statute and because, with respect "to the existing houses in the block in question, the actual differences in respect of the building lines upon which more than sixty per cent of them stood are so slight as to be entirely negligible upon the question of certainty."

Complaints of unconstitutional action by state courts in criminal proceedings arose in a number of cases to be considered more in detail in a separate study dealing with Criminal Prosecution and Punishment. Over the dissent of Justices McReynolds and Sutherland, *Moore* v. *Dempsey*[89] ordered a federal district court to grant a writ of *habeas corpus* in favor of a person whose conviction in the state trial court had been affirmed by the state supreme court, where the petition for the writ alleged dominance of the trial by a mob to such an extent that the tribunal might be deemed to be in no substantial sense a court. On the other hand, in *Ashe* v. *United States ex rel. Valotta*[90] a district judge was reversed for granting a writ of *habeas corpus* and discharging a prisoner from the custody of a state official after conviction had been affirmed by the state supreme court. The ground for granting the writ was that the prisoner had been tried upon two indictments at the same time and had thereby been deprived of the full number of challenges that he would have had upon two separate trials. Mr. Justice Holmes declared that there was no basis whatever for the contention that this mode of trial deprived a court of its initial jurisdiction so as to warrant federal interference by *habeas corpus,* and he added that the mode of trial would satisfy the requirements of due process upon direct attack.

A successful invocation of the Fourteenth Amendment to annul a conviction before a state official having a personal and official interest in finding a defendant guilty appears in *Tumey* v. *Ohio.*[91] Trial was before a mayor whose only compensation

[89] 261 U. S. 86, 43 Sup. Ct. 152 (1923), discussed in 37 HARV. L. REV. 247, 265; 7 MINN. L. REV. 513; 73 U. PA. L. REV. 430; 9 VA. L. REG. [N. S.] 56; 9 VA. L. REV. 556; and 33 YALE L. J. 82.

[90] 270 U. S. 424, 46 Sup. Ct. 333 (1926).

[91] 273 U. S. 510, 47 Sup. Ct. 437 (1927), considered in John M. Pfiffner, *The Mayor's Court and Due Process,* 12 IOWA L. REV. 393; and notes in 2

from judicial work was derived from costs paid by convicted defendants. Acquittals yielded the mayor nothing. The costs payable to the mayor in the particular case were $12, and for the past few months he had been earning about $100 by finding defendants guilty. To the Ohio supreme court these facts presented no serious constitutional problem sufficient to induce it to entertain discretionary review. To Mr. Chief Justice Taft and his colleagues, the subjection of a defendant to the mercies of an official thus financially interested in convicting him was so at variance with traditions of decency as to constitute a denial of due process of law. For official reasons also the mayor was interested in convicting defendants. One-half of the fines went to the city. The mayor was in general charge of the finances of the city. The particular city whose high official the mayor was, had a population of 1,104, but liquor prosecutions for acts anywhere in the county of over half a million inhabitants could be brought before any mayor or other designated official in any subdivision of the county. The range of possible fines was from $100 to $1,000 for a first offense and from $300 to $2,000 for a second offense. There was no dearth of disinterested officials in whom jurisdiction over offenses might be vested, so that this choice of one who could at the same time be judge and tax gatherer lacked any justification of necessity. These facts were held by the Chief Justice to constitute an independent ground why trial before such a magistrate is an offense against the proprieties embraced within the conception of due process of law.

The situation in *Dugan* v. *Ohio* [92] was found to be sufficiently different to make a mayor so slightly an interested person as not to be an improper tribunal to try a criminal case. The City of Zenia had a commission form of government with a city manager. The mayor is a member of the commission which exer-

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ALA. L. J. 257; 40 HARV. L. REV. 1149; 3 IND. L. J. 654; 31 LAW NOTES 185; 6 NEB. L. BUL. 311; 5 NO. CAR. L. REV. 257; 2 NOTRE DAME LAW. 214; 1 U. CIN. L. REV. 338; 13 VA. L. REG. [N. S.] 367; 13 VA. L. REV. 584; 5 WIS. L. REV. 177; and 36 YALE L. J. 1171. On cases holding defendant loses right to complain of pecuniary interest of judge if he does not make seasonable objection thereto, see 41 HARV. L. REV. 915; 23 ILL. L. REV. 394; 6 NO. CAR. L. REV. 234; 14 VA. L. REV. 483; and 37 YALE L. J. 821.

[92] 277 U. S. 61, 48 Sup. Ct. 439 (1928), discussed in 23 ILL. L. REV. 827.

cises legislative power. His functions as mayor are exclusively judicial. He receives no fees. His compensation is fixed by his colleagues on the commission. It is paid from a general fund. The fact that fines in liquor cases contribute to this general fund was thought by Mr. Chief Justice Taft to be too insignificant to warrant an inference that the mayor would be moved by financial interests of the city in considering the cases brought before him. The Chief Justice does not tell us whether the mayor's jurisdiction was confined to cases arising in Zenia, but he recites that Mr. Dugan's alleged acts were done in Zenia, and that Zenia is the capital of Greene County and its largest city. We are to infer that it was not a shopping place where prosecutors would be tempted to resort for convictions for numerous acts committed in a large outside urban community.

A contention that the Fourteenth Amendment imposes some requirement of a public trial in criminal cases in state courts was left without determination in *Gaines* v. *Washington* [93] because Mr. Chief Justice Taft saw no reason to reject the finding of the state supreme court that the public were not in fact excluded from the court room. The judge had announced that the general public would be excluded, but there was no formal order and no further action. Prosecution by information rather than by indictment was sanctioned by invoking a precedent, and the objection that the prosecutor was in a rage at an investigation before the coroner was branded as frivolous. Whether the Fourteenth Amendment requires presence of the accused at the trial must be surmised from the statement that the record entry of "all parties and counsel present" during the trial, "certainly complies with due process of law required by the Fourteenth Amendment."

Issues of procedure and substance were unsuccessfully adduced in *Kelley* v. *Oregon* [94] on behalf of one who committed a murder while serving a term of life imprisonment in a penitentiary. Some complaint as to the state court's charge on the law of self defense was held to raise no question under the Federal Constitution. An objection to being in the custody of the

[93] 277 U. S. 81, 48 Sup. Ct. 686 (1928), considered in 3 TEMP. L. Q. 76.
[94] 273 U. S. 589, 47 Sup. Ct. 304 (1927), discussed in 14 VA. L. REV. 62.

warden while on trial for homicide was similarly dismissed, subject to the comment that there was no showing that the prisoner lacked full opportunity to consult with counsel and to secure needed witnesses. The queerest contention of all was that the prisoner had a vested right to serve out his original life sentence before execution of the sentence of death for his second crime. Mr. Chief Justice Taft remarked that "the penitentiary is no sanctuary, and life in it does not confer immunity from capital punishment provided by law."

A conviction in a state court for violation of a state prohibition law was sustained in *Herbert* v. *Louisiana* [95] notwithstanding objections that the state court was without jurisdiction because the defendant was out on bail on an indictment in the federal court for an offense committed by the same acts which lay at the basis of the state conviction. What was in essence a complaint against double jeopardy was put forth as a contention that federal jurisdiction was exclusive. Without indicating whether protection against double jeopardy is embraced within the conception of the due process of law required by the Fourteenth Amendment,[96] Mr. Justice Van Devanter invoked a decision

[95] 272 U. S. 312, 47 Sup. Ct. 103 (1926), considered in 7 BOST. U. L. REV. 57; 12 CORNELL L. Q. 212; 11 MINN. L. REV. 173; 3 NOTRE DAME LAW. 218; and 12 ST. LOUIS L. REV. 118.

[96] Apparently this has never been decided. In McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389 (1901), and Keerl v. Montana, 213 U. S. 135, 29 Sup. Ct. 469 (1909), the opinions put the issue to one side and say that it is not necessary to decide it when the objection of double jeopardy is not well taken. These caveats doubtless require us not to attach much weight to the fact that double jeopardy complaints were rejected in Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179 (1895), and Graham v. West Virginia, 224 U. S. 616, 32 Sup. Ct. 583 (1912) without expressly reserving the question whether imposition of double jeopardy is a denial of due process. In both cases there were other invocations of the due process and equal protection clauses which would explain failure to dismiss the writs of error. In Bohannan v. Nebraska, 118 U. S. 231, 6 Sup. Ct. 1049 (1886), Mr. Chief Justice Waite made the astonishing slip that an objection to double jeopardy based on the explicit clause of the Fifth Amendment gives jurisdiction to the Supreme Court to review a state decision sustaining the second state prosecution. This had long before been negatived in a double jeopardy case in Fox v. Ohio, 5 How. (46 U. S.) 412 (1847). The Chief Justice's slip in the Bohanan Case could hardly have been an inadvertence in saying "Fifth" for "Fourteenth," because in the statement of facts the contention repeats the explicit terms of the Fifth Amendment. For cases in which the problem of identity of offenses is

holding that the United States may punish the same sale punished by a state and observed that the offense against state law is distinct from the offense against federal law, since the state is exercising its own inherent power and not an authority derived from the Eighteenth Amendment. If the United States does not object to the state prosecution, the jurisdiction of the state court is unaffected by the fact that the defendant is out on bail awaiting trial in a federal court. Another objection was that the state court had misconstrued state statutes and had thereby imposed a penalty not warranted by the state law. Mr. Justice Van Devanter answered that the "Fourteenth Amendment does not take up the statutes of a state and make them the test of what it requires." The only question is whether the

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considered in determining whether a state prosecution is an invasion of some exclusive authority in the United States, see Fox v. Ohio, 5 How. (46 U. S.) 412 (1847); Moore v. Illinois, 14 How. (55 U. S.) 13 (1852); Coleman v. Tennessee, 97 U. S. 509 (1879); and Carlesi v. New York, 233 U. S. 51, 34 Sup. Ct. 576 (1914).

In Shoener v. Pennsylvania, 207 U. S. 188, 28 Sup. Ct. 100 (1907), Mr. Justice Harlan accepts as final a state decision that there was no earlier jeopardy for the offense for which the defendant was convicted, and says that this is a question of local law which presents no question of a federal nature. He goes on, however, to approve of the state decision on the point and concludes by saying: "As it was thus correctly decided that the accused was not, by the present indictment, put in jeopardy for the second time for the same offense, we need not go further or consider any question of a Federal nature, and the writ of error must be dismissed" (207 U. S., at page 196). In so far as this language goes, the inference might be that the writ of error was dismissed, not because the issue of double jeopardy cannot be raised under the Fourteenth Amendment, but because the state court had rightly decided the question of local law whether the former offense was the same as that for which the accused was later prosecuted. Yet earlier it is said that the state decision is final, and this could hardly be the case if there were a federal right to be saved from double jeopardy imposed by a state, since state courts cannot preclude Supreme Court review of questions of local law when state decisions might serve as a device to foreclose consideration of the federal issue. Whatever the writer of the opinion may have thought, we cannot infer that the Supreme Court is convinced that a complaint of double jeopardy does not properly invoke the Fourteenth Amendment, when in Keerl v. Montana, *supra*, two years later, the issue was explicitly left open. If the law on the point is to correspond with that on analogous issues, it will be that mere technical impositions of double jeopardy will be held consistent with the requirement of due process, while serious invasions of the fundamentals of fair play underlying objections to two prosecutions for the same offense will be deemed obnoxious to the Fourteenth Amendment.

penalty actually imposed is obnoxious to the Amendment. No objection on this score was urged on behalf of the defendant.

The original Constitution forbids the states as well as the United States to pass any *ex post facto* law. *Samuels* v. *McCurdy*[97] holds that imposition of a penalty for possessing liquor lawfully acquired is not *ex post facto,* since the penalty is not for having become possessed of the liquor, but for continuing to possess it after the new statute. *Beazell* v. *Ohio*[98] lays down that the determination whether two defendants jointly indicted for a felony shall be tried separately or together goes only to the manner of the trial, and that a statute leaving the matter to the discretion of the court may be applied to an offense committed when under the law then obtaining defendants upon application were entitled to separate trials. The established datum that the *ex post facto* clause applies only to punishment for crime was invoked in *Bankers Trust Co.* v. *Blodgett*[99] to exclude the clause from consideration in sustaining a retroactive change in a tax law which subjected to additional estate taxes property which the decedent had failed to return for taxation before the new law was passed.

In twelve of the cases included in this section, legislative or judicial action was declared unconstitutional. Nine of them are decisions reviewed earlier in sections concerned primarily with substantive regulations.[100] Of the other three, *Manley* v. *Georgia*[101] ought very likely to have been recounted with other regulations of banking in the section on financial interests. This unanimously declared unconstitutional a statutory presumption of fraud on the part of bank officials upon proof that the bank has become insolvent. The court was unanimous also in *Tumey* v. *Ohio*[102] which thought it wrong to subject an accused to trial before a magistrate financially interested in discovering him

[97] Note 69, *supra.*

[98] 269 U. S. 197, 46 Sup. Ct. 68 (1925), considered in Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States,* 15 CALIF. L. REV. 269; and notes in 4 TEX. L. REV. 382 and 74 U. PA. L. REV. 400.

[99] 260 U. S. 647, 43 Sup. Ct. 235 (1923).

[100] These are the cases cited in notes 45, 46, 52, 60, 66, 67, 71, 83 and 84, *supra.*

[101] Note 80, *supra.*

[102] Note 91, *supra.*

guilty. *Moore* v. *Dempsey*[103] held that a court is not a court if its proceedings are dominated by mob pressure, and directed a lower federal court to issue a writ of *habeas corpus* and ascertain if such was the fact. Here Justices McReynolds and Butler dissented, but apparently for reasons that would not have moved them if the facts had been duly established in the state tribunal and there held to constitute no ground for a new trial.

XIII. DISCRIMINATION

Two clauses of the Constitution restrict the power of the states to discriminate as they will between one person and another. Both clauses are limited in scope, since neither applies to all sorts of persons. Section 2 of Article 4 of the original Constitution declares somewhat cryptically that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This has been interpreted to mean that no state may discriminate against citizens of a sister state in favor of its own citizens unless the discrimination is warranted by the situation. Discriminations against non-residents are not necessarily discriminations against citizens of sister states. To avoid the application of the privileges-and-immunities clause, *Douglas* v. *New York, N. H. & H. R. Co.*,[104] over the dissent of Mr. Chief Justice Taft and Justices Van Devanter and Butler, assumed that a New York statute closing the door of the courts to non-residents bringing actions against foreign corporations for extraterritorial injuries would be applied to a New York citizen resident in Connecticut and would not be applied to a Connecticut citizen resident in New York. The residential basis of the discrimination was declared to be a rational one, though it is not clear that the equal-protection clause had been invoked by the excluded plaintiff. The long established ruling that "a corporation is not a mere collection of individuals capable of claiming all benefits assured them by section 2, Article IV, of the Constitution" was applied in *Hemphill* v. *Orloff*[105] to a

[103] Note 89, *supra.*

[104] 279 U. S. 377, 49 Sup. Ct. 255 (1929), *supra,* pages 242-243.

[105] 277 U. S. 537, 48 Sup. Ct. 597 (1928), *supra,* pages 190-191, 241-242, 280.

Massachusetts trust with many of the attributes of a corporation. Such a trust was excluded from a state court because it had not complied with statutory registration requirements. A similar restriction on capacity to bring suit was enforced in *Bothwell* v. *Buckbee, Mears Co.*[106] against the receiver of an unregistered foreign corporation, though it does not appear that the privileges-and-immunities clause was invoked. The issue in the case was whether the foreign corporation had done unlicensed business within the state.

The second constitutional caution against discrimination is that part of section 1 of the Fourteenth Amendment which reads: * * * "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." The due-process clause applies to all persons; the equal-protection clause, only to persons within the jurisdiction. At one time it was assumed that foreign corporations are not persons within the jurisdiction even if they have been duly admitted to do business. The process of whittling away this limitation on the class of those who may invoke the equal-protection clause has been going on for some time and has been continued during the period under review. In *Hanover Fire Insurance Co.* v. *Harding*[107] Mr. Chief Justice Taft extends the protection of the clause to an insurance company with an established business within the state which it had built up by virtue of repeated renewals of an annual license. This represents an extension of an earlier case in which the company had been admitted under an indefinite license and had acquired a large amount of physical property employed in running a railroad. As to the term of the license, the Chief Justice says that "in this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens." The case saved the corporation from a discriminatory tax and it negatives any power on the part of the state to exact submission to such discrimination as the price of permission to enter the state. If, however, the exac-

[106] 275 U. S. 274, 48 Sup. Ct. 124 (1927), *supra,* pages 149-150, 191, 242.
[107] 272 U. S. 494, 47 Sup. Ct. 179 (1926), *supra,* pages 192-193.

tion is imposed, not as part of the general tax burden, but as the price of admission for a corporation outside the state and seeking to enter it, there can be no successful invocation of the equal-protection clause. The Chief Justice does not make it explicit whether this is because the not-yet-licensed foreign corporation is not a person within the jurisdiction or merely because the power to exclude carries with it an arbitrary power to exact antecedent conditions of admission, so that the classification is reasonable even if it must meet the test of the equal-protection clause. In *Power Manufacturing Co.* v. *Saunders,*[108] the equal-protection clause was successfully invoked by a foreign corporation that had been duly admitted to the state. The opinion proceeded on the tacit assumption that nothing more than such admission is now necessary to make the foreign corporation a person within the jurisdiction. The dissent is confined to the positions that the discrimination was reasonable and that the requirement was one that could constitutionally be made a condition of the license to enter. Four years earlier in *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*[109] a foreign corporation in the state solely as plaintiff to sue for the recovery of property brought into the state by an alleged wrongdoer was held to be for the purposes of the suit a person within the jurisdiction. Here the dissent was based in part squarely on the ground that the equal-protection clause was not available to a foreign corporation not doing business within the state.[110]

Turning to the discriminations that are forbidden by the equal-protection clause, we find only five cases in which objections have been sustained. This indicates the comparative unimportance of the clause. Two of the cases were the ones last reviewed on the point of "person within its jurisdiction." The

[108] 274 U. S. 490, 47 Sup. Ct. 678 (1927), *supra,* pages 192, 251-252.

[109] 262 U. S. 544, 43 Sup. Ct. 636 (1923), *supra,* pages 194, 249-251.

[110] For decisions holding that the Fourteenth Amendment is no shield to a municipality against control by the state, see Trenton v. New Jersey, 262 U. S. 182, 43 Sup. Ct. 534 (1923); Newark v. New Jersey, 262 U. S. 192, 43 Sup. Ct. 539 (1923); Risty v. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 46 Sup. Ct. 237 (1926); and Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 43 Sup. Ct. 684 (1923), *supra,* pages 18-24.

Power Manufacturing case [111] had to do with venue. The majority saw no reason why foreign corporations duly admitted to the state should be subject to suit in any county in the state while domestic corporations could be sued only where they have their chief place of business or where their chief officer resides, and natural persons could be sued only where they reside or are found by a process server. The dissenters thought that the foreign corporations should be deemed to have assented to the regulation and pointed out that the difference between one county and another would be likely in most cases to matter much less to a foreign corporation with its main headquarters outside of the state than to a domestic corporation with its principal office within the state. The *Kentucky Finance* case [112] involved a somewhat similar discrimination as to the place in which plaintiffs could be compelled to appear for examination before trial. It was held unreasonable to require foreign corporations to appear for examination in any county in the state which the court might select, while domestic corporations and resident individuals were subject to examination only in the county of their residence, and non-resident individuals could be examined only in the county where actual service was had upon them. In fact in the case at bar the defendant had been ordered to appear at the place where it had instituted the suit, but the court found it arbitrary to impose this apparently reasonable requirement when it was not imposed on others.

In these two cases the discrimination was not in itself of any material concern to the objectors. Neither of them would have felt better if the discrimination had been removed by subjecting every one else to suit or to examination before trial in any county that the trial court might select. Both of them minded only what was done to them and cared not at all for the fact that something less onerous was required of others. There is no suggestion in the opinions that a due-process complaint might be successful against a statute making the state a single district for venue or against a statute compelling examination before trial in the place where suit is brought or in other places directed by the court.

[111] Note 108, *supra*.
[112] Note 109, *supra*.

Thus the equal-protection clause seems to serve a due-process function where due-process could not be made to do so. In this, however, there is nothing new. Discriminations that hurt have been found reasonable and discriminations that do not hurt have been found unreasonable. From these two cases alone, we should infer that the law is that there must be reason for the discrimination whether it hurts or not. Yet from other cases we shall see that it is often reason enough that the evil sought to be remedied is an evil, even though equally evil evils still await the attention of the legislature.

In two other cases in which discriminations were condemned, the discrimination really mattered to those who complained of them. Encouragement of plaintiffs by possibility of counsel fees and penalties is always of concern to defendants. If plaintiffs were subject to like incidents of defeat, they might well be more amenable to offers of settlement. If nothing were ever added to damages, lawsuits would be less likely. Equality between plaintiffs and defendants is better for defendants than is inequality that favors plaintiffs. Thus it was clearly a harmful discrimination that was prevented when *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*[113] held that a plaintiff who was but partially successful on an appeal could not be rewarded with an attorney fee for the appeal. So far as appears the defendant contested the whole verdict so that the plaintiff had to keep on fighting to save anything. The same case sustained an attorney fee awarded by the trial court for a verdict that was less than what the plaintiff claimed but more than what the defendant offered. If the defendant must pay a fee though he cuts down the plaintiff's claim at the trial, it would seem equally reasonable to make him pay a fee for putting the plaintiff to the expense of an appeal which results in corresponding partial success.

The discrimination condemned in *Frost* v. *Corporation Commission*[114] was one which required of private persons a showing of public necessity as a condition of obtaining a license to run a cotton gin, but dispensed with such requirement in the case of stock co-operatives not deemed to be true co-operatives. The

[113] 260 U. S. 35, 43 Sup. Ct. 55 (1922), *supra,* page 270.
[114] 278 U. S. 515, 49 Sup. Ct. 235 (1929), *supra,* pages 180-185.

condemnation was visited not on the requirement on the private ginner but on the lack of the same requirement on the co-operative. The difficulties of giving a standing in court to the private ginner who had obtained his license have already been sufficiently detailed. The complaint would have been more appropriately advanced by one who had been denied a license for reasons that would not have been fatal to others. Had the discrimination been condemned in such a case, the state would have to remove it by requiring a showing of necessity from all or from none. One who wished to run a private gin would prefer equal freedom for all or equal restraint on all to restraint on himself and freedom for others. Clearly one who has obtained a license on a showing of need would prefer that a like showing be required of others. The plaintiff here was really harmed by the easier opening of the door to competitors. If they had to show a public need, the result would be either that they would not become competitors or that there would very likely be enough business so that competition would not be ruinous. While it may be that the Supreme Court was precipitate in deciding the question, the issue was one practically certain to be duly raised in proceedings that would have left a private person free to become a ginner with no showing of necessity. Here the result is to subject the co-operatives to a requirement that the legislature distinctly did not wish them to face. In the particular case the result seems absurd, notwithstanding the reason that the relief from the requirement was in an amendment to an earlier statute which imposed it on all. In the long run, however, it does not greatly matter, for on proper proceedings with a judgment adverse to the discrimination, the state would be faced, as it is now, with the exclusive alternative of imposing the requirement on all or on none. The more fundamental quarrel with the case is with the failure of the majority to recognize that stock co-operatives are substantially like non-stock co-operatives and substantially unlike purely private enterprises for private profit.

In 1873, in referring to the equal-protection clause of the Fourteenth Amendment, Mr. Justice Miller said that "we doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of

their race, will ever be held to come within the purview of this provision." [115] Notwithstanding this early judicial doubt, the members of the race for whom the clause was primarily designed have shared its protection lavishly with others. The cases in which negroes have successfully protested against discrimination are few. Among these few is *Nixon* v. *Herndon* [116] which declares unconstitutional a statute excluding negroes from participation in a Democratic party primary. The decision was based on the equal-protection clause of the Fourteenth Amendment without considering whether exclusion from a primary could be regarded as a denial of the right to vote on account of race or color in violation of the Fifteenth Amendment. If we can assume that the decision would have been the same had the Fifteenth Amendment never been enacted, then the Fifteenth Amendment seems to be superfluous.

Of the numerous cases which rejected complaints founded on the equal protection clause, only two seem to be ones in which the objector relied exclusively or predominantly on that clause. There was no due-process issue in *Gong Lum* v. *Rice* [117] in which a state was allowed to exclude a Chinese child from public schools reserved for white children when it appeared that there were other public schools available in the neighborhood. In *Bryant* v. *Zimmerman* [118] the due-process objection to requiring the Ku Klux Klan to register and file the names of their members was dismissed briefly, and the opinion concerned itself mainly with elaborating why the legislature might reasonably show more leniency toward the Masons and Knights of Columbus and other organizations which, like the Ku Klux Klan, had an oath-bound membership. While the Klan would hardly be helped if these other organizations had been similarly treated, there is more than "misery loves company" to their equal-protection complaint. If all brotherly associations had to be treated alike, the Klan would have powerful allies in resisting the enactment of unwelcome restrictions.

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[115] Slaughter House Cases, 16 Wall. (83 U. S.) 36, 81 (1873).
[116] 273 U. S. 536, 47 Sup. Ct. 446 (1927), *supra,* pages 10-11.
[117] 275 U. S. 78, 48 Sup. Ct. 91 (1927), *supra,* pages 33-70.
[118] 278 U. S. 63, 49 Sup. Ct. 61 (1928), *supra,* pages 64-65.

Delegations of power to administrative authorities were sustained in a number of cases which recognized that proof of arbitrary discrimination on the part of the board would raise an equal-protection issue but found no such issue duly raised in the proceedings at bar.[119] It seems that the vesting of arbitrary power to discriminate is an offense against both the due-process and the equal-protection safeguards, except where there is sufficient justification. In view of the fact that the court once seemed of opinion that the state as proprietor could discriminate as whimsically as any private individual, it is interesting to observe that the exclusion of an osteopath from practice in a public hospital was justified as intrinsically reasonable and not by invocation of this notion of arbitrary power.[120] A physician who complained of discrimination in a statute providing for revocation of licenses was told that so long as all physicians are treated alike it does not matter that the statute does not apply to others also.[121]

Discrimination against aliens in forbidding them to acquire various interests in agricultural lands were sustained in several cases. It does not matter that the restriction is confined to aliens ineligible to citizenship,[122] or to them and those who may become citizens but have not sought to do so.[123] While ordinary occupations cannot be closed to aliens by statute, this protection does not apply to cropping contracts [124] or to the conduct of a pool and billiard room.[125] A presumption of intent to make a forbid-

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[119] Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24 (1922), *supra,* page 71; Douglas v. Noble, 261 U. S. 165, 43 Sup. Ct. 303 (1923), *supra,* page 78; Gorieb v. Fox, 274 U. S. 603, 47 Sup. Ct. 675 (1927), *supra,* pages 111-113.

[120] Hayman v. Galveston, 273 U. S. 414, 47 Sup. Ct. 363 (1927), *supra,* pages 35-36, 79. This is true also of exclusion from a public school, sustained in Gong Lum v. Rice, note 117, *supra.*

[121] Hurwitz v. North, 271 U. S. 40, 46 Sup. Ct. 384 (1926), *supra,* pages 80-81.

[122] Porterfield v. Webb, 263 U. S. 225, 44 Sup. Ct. 21 (1923), *supra,* page 124.

[123] Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15 (1923), *supra,* pages 123-124.

[124] Webb v. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112 (1923), *supra,* pages 124-125.

[125] Clarke v. Deckebach, 274 U. S. 392, 47 Sup. Ct. 630 (1927), *supra,* pages 81-82.

den transfer of land may be confined to payments by an alien for land taken in the name of a citizen, when the presumption applies equally to the forbidden acts of citizens and aliens.[126]

For full understanding of the cases on discrimination, it is of course essential to consider what a statute commands or forbids, since the reasonableness of a classification varies with the use to which it is put. The recital here should be received as merely an index to the fuller treatment in previous sections. With this caution, we may call to mind that the state may proscribe unlawful methods of effecting changes in industrial and political arrangements without dealing with similar efforts to maintain the *status quo*,[127] may command sterilization of imbeciles in public institutions without inclusion of other imbeciles,[128] may confine a regulation of banking enterprise to those who receive deposits under $500,[129] may deal only with checks presented by mail or express or through a Federal Reserve bank,[130] may exempt singers, performers, and attendants in cloak rooms from the grasp of a statute regulating night work for women in restaurants,[131] may restrict the power of the highest state court so that state constitutional law may be different in one circuit from what it is in another,[132] may exempt private drivers, drivers in smaller cities, and street cars and omnibuses from the duty to furnish bonds which it imposed on other drivers of motor vehicles for hire,[133] may confine to actions for defective fertilizers a condition precedent of public inspection of products alleged to be de-

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[126] Cockrill v. California, 268 U. S. 258, 45 Sup. Ct. 490 (1925), *supra*, page 126.

[127] Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641 (1927), *supra*, pages 58-60.

[128] Buck v. Bell, 274 U. S. 200, 47 Sup. Ct. 584 (1927), *supra*, pages 72-73.

[129] Dillingham v. McLaughlin, 264 U. S. 370, 44 Sup. Ct. 362 (1924), *supra*, pages 153-154.

[130] Farmers' and Merchants' Bank v. Federal Reserve Bank, 262 U. S. 649, 43 Sup. Ct. 651 (1923), *supra*, pages 148-149.

[131] Radice v. New York, 264 U. S. 292, 44 Sup. Ct. 325 (1925), *supra*, page 213.

[132] Bryant v. Akron Metropolitan Park District, 281 U. S. 74, 50 Sup. Ct. 228 (1930), *supra*, pages 7, 243-244.

[133] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257 (1927), *supra*, pages 40-41, 277.

fective,[134] may deny to guests in automobiles a right of action not withheld from guests in other vehicles,[135] may restrict to carriers the loss of a right to defend claims not paid or rejected within ninety days of presentation,[136] may apply only to transactions in real estate and corporate stock a special liability for fraud,[137] and may confine to contracts between co-operatives and their members a provision penalizing outsiders for knowingly buying products which the vendor has previously contracted to sell to another.[138]

Our earlier recital of this co-operative case has dealt with the question whether the writer of the opinion thinks that the defendant could complain only of discrimination against himself or could complain also because he was forbidden to interfere with some contracts rather than with all. The opinion is not sufficiently explicit to be taken as a rejection of an earlier notion that it may be a denial of equal protection to restrain a man in some instances when he is not restrained in others. Another point of more general application is the ruling that a state may require payments to special funds to be made only by employers who happen to have employees killed without leaving dependents, because "this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law." [139] Where a similar payment may be required of employers relieved from making direct compensation because the injured workman has recovered more than full compensation from a tort-feasor,

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[134] Jones v. Union Guano Co., 264 U. S. 171, 44 Sup. Ct. 280 (1924), *supra*, pages 122, 240.

[135] Silver v. Silver, 280 U. S. 117, 50 Sup. Ct. 57 (1929), *supra*, page 279.

[136] Southern R. Co. v. Clift, 260 U. S. 316, 43 Sup. Ct. 126 (1922), *supra*, page 271. For subjection of carriers to counsel fees if plaintiff wins in trial court more than amount tendered by carrier, see Chicago & N. W. R. Co. v. Nye Schneider Fowler Co., note 113, *supra*.

[137] James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 47 Sup. Ct. 308 (1927), *supra*, pages 235-236, 264, 269.

[138] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 71, 48 Sup. Ct. 291 (1928), *supra*, pages 176-180.

[139] Sheehan Co. v. Shuler, 265 U. S. 371, 44 Sup. Ct. 548 (1924), *supra*, pages 227-228.

this classification may be followed in giving the employer a right to recover from the tort-feasor what he has had to pay to the fund.[140] Thus because the tort-feasor has paid the employee more than he could claim from his employer, the tort-feasor has to make an added payment to the employer to recompense him for what he had to pay to the fund because he didn't have to pay anything to his employee because of the employee's recovery from the tort-feasor. This again is not a classification of persons but merely the selection of a contingency, though sometimes a rather rough one.

Even where foreign corporations may invoke the equal-protection clause, they are not necessarily entitled to identical treatment with domestic corporations. This is declared by Mr. Justice Van Devanter in *National Fire Insurance Co.* v. *Wanberg*[141] in rejecting a complaint that a requirement bore more heavily on companies whose principal offices are remote from the state than on those whose headquarters are near at hand. He also points out that this "is a circumstance necessarily incident to their conduct of business in another state, of which they cannot complain." This suggests the query whether a statute that treats all alike would ever be held void for discrimination because they are so unlike that equality operates to produce inequality.

There are a number of other cases in which statutes were declared not to deny equal protection of the laws, though there was no revelation of the particular discrimination complained of. Zealous counsel seem to invoke the equal-protection clause with some vague hope that a statute may be condemned because it commands or prohibits something less than everything. Most of the contentions here rejected were frivolous in the extreme. Yet the words of the constitutional provision are broad enough to give the court a free hand to condemn as it will. Once it seemed to be the official notion that police regulations must show more justification for discrimination than would be required of tax laws. Today the trend seems to be in the opposite direction. This is not to say that the court has become more tolerant to-

[140] Staten Island R. T. R. Co. v. Phoenix Indemnity Co., 281 U. S. 98, 51 Sup. Ct. 242 (1930), *supra*, pages 229-231.

[141] 260 U. S. 71, 43 Sup. Ct. 32 (1922), *supra*, pages 136-137.

ward police power. A study of the judicial negatives predicated on the due-process clause would lead rather to the opposite conclusion. Many of those negatives might have condemned discrimination if they had not found it feasible to condemn more broadly. Equal protection and due process are handmaidens that help each other with their tasks. One may be doing less only because the other is doing more.

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